TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 990. ~~625~~ 340

JOHN HASKELL BUTLER, ADMINISTRATOR, NATHANIEL BEACH, ELIZABETH R. BEACH, AND ANNA BEACH, APPELLANTS,

vs.

THE BOSTON AND SAVANNAH STEAMSHIP COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED SEPTEMBER 14, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

United States of America.

MASSACHUSETTS DISTRICT, SS.

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston within and for the District of Massachusetts, on Saturday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-six.

Before the Honorable

LEBARON B. COLT, *Circuit Judge.*

IN ADMIRALTY.

JOHN HASKELL BUTLER, Administrator, et al.,

APPELLANTS.

v.

BOSTON & SAVANNAH STEAMSHIP COMPANY,

LIBELLANTS, APPELLEES.

The Transcript of the Record of the District Court of the United States for this district was duly filed and entered at the May term of this court, A. D. 1885, and is in the words and figures following: —

~~IN ADMIRALTY.~~

~~Circuit Court of the United States,~~

~~DISTRICT OF MASSACHUSETTS.~~

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.

At the District Court of the United States, begun and holden at Boston, within and for the District of Massachusetts, on the third Tuesday (being the seventeenth day) of March, in the year of our Lord one thousand eight hundred and eighty-five.

Before the Honorable
THOMAS L. NELSON, *Judge.*

THE BOSTON AND SAVANNAH STEAMSHIP COMPANY, *Libellants or Petitioners*, for limitation of liability, in matter of the Steamship "City of Columbus."

LIBEL.

This libel or petition was filed in Court on the 18th day of February, A. D. 1884, and is as follows, viz: —

IN ADMIRALTY.

DISTRICT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

To Honorable THOMAS L. NELSON, *Judge of said Court:* —

The libel and petition of the Boston and Savannah Steamship Company, a corporation duly established by law and located in Boston in said District, owner at the times hereinafter alleged

of the steamship "City of Columbus," of Boston, her machinery, tackle, apparel and furniture, against James Brown, of Lawrence, and Sherrington Vance, of Boston, both in said District, and against any and all other persons and corporations, now or hereafter making or alleging any claims against said steamship, or the libellant as owner thereof, by reason of the loss and matters hereinafter alleged, in a cause of damage and limitation of liability, civil and maritime. And thereupon the libellant alleges and articulately propounds as follows: —

First. The libellant was at the times hereinafter referred to, the sole and *bona fide* owner of said steamship "City of Columbus," her machinery, tackle, apparel and furniture, and of her freight pending at the time of the loss hereinafter alleged; and said steamship was for a long time, and until the loss hereinafter alleged, employed and used by the libellant as a passenger and freight steamship upon the high seas on voyages between the ports of Boston in said District, and Savannah, Georgia.

Second. Said steamship "City of Columbus," an iron steamship of about 1,997 tons burden, enrolled in said port of Boston, left Boston on her voyage to Savannah, on the afternoon of the 17th day of January last past, in perfectly seaworthy and good order and condition, well and thoroughly manned, furnished and equipped in every respect as by law required, under the command of experienced, careful and skillful officers, and with a competent and efficient crew of about forty men.

She had on board for said voyage, a number of cabin and steerage passengers, to wit, about eighty-three, a list of whom, so far as is known to the libellant, is hereto annexed marked "Exhibit A.," and made part of this libel. She also had on board for said voyage, baggage and personal effects of said passengers, officers and crew, and cargo, consisting of boots and shoes, provisions, furniture and other merchandise, shipped by various owners or consignors, part of said cargo, as the libellant is informed and believes, being insured in the Boston Marine Insurance Company, and in various other Companies, whose names are unknown to the libellant, against loss or damage by perils of the sea or otherwise. A partial schedule of said cargo, as complete and accurate as is known to the libellant, and can

be made by it, is annexed, marked "Exhibit B.," and made part of this libel.

Third. While prosecuting said voyage towards Savannah, with said passengers, crew, cargo, and property on board, and while on the high seas, to wit, in or near Vineyard Sound, said steamship struck on the rocks near and off the shore at Gay Head, in Martha's Vineyard, in said District of Massachusetts, striking about half-past three o'clock in the morning of January 18th last past; and in a very few minutes thereafter said steamship heeled over, filled with water, and sank, becoming a total wreck and loss.

Fourth. By reason of such striking on the rocks, filling with water, and sinking, most of the passengers and crew on board said steamship, to wit, about one hundred, were drowned and lost; those surviving were exposed to the weather and sea, and claim to have suffered great injury thereby in mind and body; all personal effects and property of the passengers, officers and crew on board, and all the cargo on board, excepting a small part salved and recovered in a damaged condition and of little value, were destroyed and lost, together with said steamship, its machinery, tackle, apparel and furniture.

Fifth. All said great loss of life, injury and damage to persons on board, and loss of and damage to property, were occasioned and incurred without the privity or knowledge of the libellant, the owner of said steamship.

Sixth. The libellant further alleges, that as it is informed and believes, certain persons or corporations, owners or insurers of property on board and lost or damaged by and at the loss of said steamship as aforesaid; certain other persons who claim to have been on board said steamship at the time of the loss aforesaid, and to have suffered in consequence thereof injuries and damage to their persons and property; and still other persons claiming to represent persons drowned and lost in said disaster, and claiming to be entitled to recover and receive large sums of money on account of the death of and injury to said persons so represented by them,—all make, or may hereafter make, claim that the striking upon the rocks, and sinking and wreck of said steamship, and the loss of life, damage to persons and property aforesaid, were occasioned and incurred from the fault and neg-

lect of the libellant, or its officers and agents, and that the libellant is liable and responsible to pay to them the loss and damages arising as aforesaid; all of which claims and allegations the libellant denies, and on the contrary it alleges that all such losses and damages were occasioned or incurred without its neglect, fault, privity or knowledge, and as it is informed and believes, without the neglect or fault of its officers or agents, or any of them.

Seventh. Heretofore, to wit, on the 12th day of February, A. D. 1884, said James Brown of Lawrence, and on the 6th day of said February, said Sherrington Vance of Boston, commenced each of them an action at law against the libellant, and the Boston Marine Insurance Company, as Trustee, in the Superior Court for the County of Suffolk in this District, and the writs therein are returnable to said Superior Court, on the first Tuesday in April next; and in each of said actions the plaintiff claims and seeks to recover damages from the libellant to the amount of $10,000, for loss and damage sustained by him by reason of the acts and losses aforesaid. And as the libellant is informed and believes, other persons and corporations threaten and claim the right to bring actions of law, or suits in admiralty, or otherwise, against the libellant to recover for the losses and damages aforesaid.

Eighth. The losses and damage to persons and property incurred and occasioned by the said stranding, sinking and loss of said steamship, and the alleged claims and liabilities made against the libellant, by reason thereof, greatly exceed the amount or value of the interest of the libellant, as owner, in said steamship, her machinery, tackle, apparel and furniture, immediately after said loss, and in her freight then pending. Upon and after the happening of said loss, said steamship, her machinery, tackle, apparel and furniture became a wreck and total loss, and the libellant is informed and believes were then practically worthless, and the libellant's interest therein became and was of little or no value. The gross freight then pending on the voyage of said steamship to Savannah, was of the value of about $1,000.

Ninth. The libellant while not admitting but denying, that it is under any liability for the acts, losses and damages afore-

said, and desiring and claiming the right in this Court to contest any such liability of itself or of said steamship, claims and is entitled to have limited its liability, as owner therefor (if any such liability shall hereafter be found to exist) to the amount or value of its interest, as owner, in such steamship after said loss, and her freight then pending.

Tenth. Said steamship, in her damaged and wrecked condition, now lies sunken near the shore at Gay Head, Martha's Vineyard, within this District, and within the jurisdiction and process of this Honorable Court.

Eleventh. All and singular the premises are true, and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, the libellant comes into this Honorable Court, informing the Court of the premises, and claiming and petitioning that in case it should be found that there is any liability for the acts, losses, and damages aforesaid, upon said steamship "City of Columbus," or the libellant as owner thereof (which liability the libellant does not admit, but expressly and wholly denies, and desires in this Court to contest), such liability shall in no event exceed the amount or value of the interest of the libellant as owner in said steamship and her freight then pending, as by law provided; —

And to this end, the libellant prays that all claims for loss, damage, or injury to persons or property by reason of the premises, and the acts and losses aforesaid, now asserted, or hereafter to be asserted, or which in any way may be asserted against the libellant, may be heard and determined in and by this Honorable Court, and that the liability of the libellant therefor, if any such liability is found to exist, may be limited to the value of the libellant's interest in said steamship, as owner thereof, immediately after the injury, damage, acts, matters, and things aforesaid, and her freight then pending; and that all claims for damage or loss as aforesaid, may be determined and apportioned according to law in such cases made and provided; and that due appraisement in proper form may be ordered and made of said steamship, her machinery, tackle, apparel and furniture, and her pending freight at the time aforesaid; and the libellant offers to and will pay the appraised value thereof into Court, or give proper stipulation with sufficient and approved sureties for

the payment thereof into Court, whenever the same shall be ordered; and it prays that upon such payment or stipulation said steamship, her machinery, tackle, apparel and furniture, or so much thereof as now remains, and said pending freight, may be delivered to the libellant; and that monition in due form of law, may issue against said James Brown of Lawrence, in said District, said Sherrington Vance of Boston, in said District, and against any and all persons or corporations claiming, or that may claim damages, by reason of the premises, and acts, and losses aforesaid, citing them and each of them to appear before this Honorable Court, and make therein due proof of their respective claims, at such time and in such manner as this Court shall order; and that the prosecution of the actions aforesaid, and any and all other actions or suits, concerning the matters and acts herein above set forth, and any and all attachments made, or that may be made, or attempted to be made upon the property of the libellant, may be restrained and enjoined by the order of this Honorable Court; and that this Honorable Court will order, do and decree all other matters and things needful and customary for the determination of the rights of all parties interested, or claiming to be interested in the premises, and for the limitation of the liability of the libellant as aforesaid; and that the libellant may have such further and other relief in the premises, as to justice may appertain, and to this Honorable Court may seem meet.

BOSTON AND SAVANNAH STEAMSHIP CO.,
By Alfred A. Nickerson, *President.*

C. T. and T. H. Russell,
Proctors for Libellant.

Commonwealth of Massachusetts,
Suffolk, ss.

On this eighteenth day of February, A. D. 1884, before me, a Notary Public in and for said County of Suffolk, personally appeared the above-named Alfred A. Nickerson, President of said Boston and Savannah Steamship Company, and made oath that the allegations in the above libel contained, by him and it

subscribed, so far as stated of its, or his knowledge are true, and so far as stated upon information and belief, he believes them to be true.

In witness whereof, I hereto set my hand and notarial seal, the day and year above written.

CHAS. THEO. RUSSELL, JR.,
[SEAL.] *Notary Public.*

This libel was entered at the December Term of this Court A. D. 1883, and thence was continued from term to term, to the December Term thereof, A. D. 1884, when on the 16th day of December, A. D. 1884, the following answer, petition and exceptions of J. Haskell Butler, adm'r, *et als.* were filed in Court, and allowed by consent of libellant, viz.: —

IN ADMIRALTY.

DISTRICT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

To the Honorable THOMAS L. NELSON, *Judge of said Court:* —

THE ANSWER, PETITION AND EXCEPTIONS

OF JOHN HASKELL BUTLER, ADMINISTRATOR OF SOMERVILLE IN SAID DISTRICT, AND NATHANIEL BEACH AND ELIZABETH R. BEACH, BOTH OF MANSFIELD, IN THE STATE OF CONNECTICUT, AND ANNA BEACH OF NEWARK, NEW JERSEY, TO THE LIBEL AND PETITION OF THE BOSTON AND SAVANNAH STEAMSHIP COMPANY.

And thereupon the said respondents and petitioners, for answer and by way of exception to the said libel and petition, do allege and propound as follows, to wit: —

FIRST COUNT.

The said John Haskell Butler, administrator, and the said Nathaniel Beach, Elizabeth R. Beach and Anna Beach, appearing herein specially and not generally, except to the said libel

and petition, and to the jurisdiction of this Honorable Court, and deny the said jurisdiction in the premises, so far as their claims herein are concerned, and they say that said Court has not jurisdiction of their claims, and has not jurisdiction to adjudicate their claims under said libel and petition, and has not jurisdiction to apply the law for the limitation of the liability of ship owners to their claims; and that the said law has no application to their claims.

SECOND COUNT.

These respondents not waiving any of the matters in their first count contained, but relying upon the same fully and entirely and reserving all their rights in the said first count contained, do further allege and propound as follows: —

First. These respondents admit the allegations of the first, third and tenth articles of the said libel and petition to be true.

Second. As to the allegations of the second article thereof, these respondents do not deny the same, except those as to the seaworthiness, good order and condition, and those as to said vessel being well and thoroughly manned, furnished and equipped; and further, except those as to said vessel being under the command of experienced, careful and skillful officers, and with a competent and efficient crew; and as to the said allegations not herein admitted, the respondents deny the same to be true.

Third. As to the allegations of the fourth article thereof, these respondents admit the same, except in so far as is hereinafter more particularly stated, touching all the causes of said disaster, loss of life and property, and suffering.

Fourth. As to the allegations of the fifth article thereof, these respondents deny the same to be true.

Fifth. As to the allegations of the sixth article thereof, these respondents do not deny the same, except they deny the averment that the losses and damages therein mentioned were occasioned or incurred without the neglect, fault, privity or knowledge of the libellant, and the neglect or fault of its officers or agents, or any of them.

Sixth. As to the allegations of the seventh article thereof, these respondents are not informed, so they can neither admit

nor deny the same, but leave the libellants to their proof thereof, if material.

Seventh. As to the allegations of the eighth article thereof, these respondents admit the same, except the averment therein that certain property therein became practically worthless, and the libellants' interest therein of little or no value.

Eighth. As to the allegations of the ninth article thereof, these respondents deny the same.

Ninth. As to the allegations of the eleventh article thereof, these respondents deny the averment of the truth of the previous allegations, and they deny that the premises thereof are within the admiralty and maritime jurisdiction of this Honorable Court.

Tenth. And these respondents further answering, say that they are informed and believe, and upon information and belief they aver, that the said steamship "City of Columbus," and her freight depending, were substantially insured, and that the owners thereof, the said Boston and Savannah Steamship Company, have received or are entitled to receive, a large amount of money, to wit, as and for the said insurance upon said vessel, and upon her pending freight, or an equivalent therefor, and that the said Company will thereby be substantially indemnified for the loss of said vessel and freight; and that said vessel and freight are not in respect to the value of the same, lost to them, the said Company, by the stranding and wrecking.

Eleventh. And these respondents further answering, say that the said Nathaniel Beach was, by the Probate Court for the District of Mansfield in the State of Connecticut, duly appointed the administrator of the estate of Elizabeth R. Beach, single woman, late of said Mansfield, Connecticut, and that said John Haskell Butler was duly appointed the ancillary administrator of the said estate, by the Probate Court within and for the County of Suffolk in the State of Massachusetts; and that said Nathaniel Beach is the father of the said Elizabeth R. Beach, deceased; and that the said Elizabeth R. Beach, one of these respondents, is the niece of the said deceased, and was dependent upon the said deceased for her support; and that the said Anna Beach is the aunt of the deceased, and the sister of the said Nathaniel Beach.

Twelfth. That on the 17th day of January, A. D. 1884, the said Elizabeth R. Beach, deceased, took passage at Boston, in the State of Massachusetts, on the steamship "City of Columbus," to proceed in her from said Boston, to Savannah, Georgia; that said vessel was a steamship of about 2,000 tons; that she was then owned, operated and used by the said Boston and Savannah Steamship Company, as a steamship for the carriage of passengers for hire and merchandise, and as a common carrier of passengers between said Boston and Savannah, and that she regularly plied between said places, engaged in the business aforesaid; that she left Boston, on said 17th day of January, bound to said Savannah, and that she carried on said trip over 100 passengers, who paid fare for their passage, and for their board and lodging during the passage; that she was regularly fitted up as a steamer for the carriage of passengers; that she was furnished with a large and commodious cabin, staterooms and steerage devoted to the use of passengers, and was in all respects arranged, with reference to her internal accommodations, as a passenger-carrying steamship. That on said 17th day of January, said Boston and Savannah Steamship Company contracted at said Boston, with said Elizabeth R. Beach, deceased, to carry her from said Boston, to St. Augustine in the State of Florida, and as far as said Savannah as a cabin passenger in said steamship, and the rest of the way by land; and that she paid said Company the sum of $ for said passage, and on said day proceeded in said vessel in pursuance of said contract, carrying with her luggage or baggage.

Thirteenth. That while said steamship was proceeding on the trip, bound as aforesaid, and with the said Elizabeth R. Beach, deceased, on board, she ran aground in the night-time, upon the shore of Martha's Vineyard, and thereafter sank and became a wreck.

Fourteenth. That there was negligence on the part of those employed by the said Boston and Savannah Steamship Company, in the grounding and wrecking of said steamship; that the night was clear, and with abundant moonlight; that the coast was well-lighted with lighthouses, and could be easily seen for a considerable distance with the naked eye; that there was not a very heavy wind or sea; but that said steamship, while on said

passage, proceeded nearer the shore than was prudent or skillful, struck the bottom, sunk and became broken and wrecked; and that about 100 of the persons on board of her, including both passengers and crew, were lost and drowned.

Fifteenth. That after said vessel struck, no proper measures were taken by the officers and crew to save the passengers by means of the boats, or to provide properly for the safety of the passengers; and that upon the happening of the disaster, and thereafter, there was great inefficiency in the discipline of the officers and crew of the vessel; and that their conduct on that occasion showed a want of drill and proper regulation for such an emergency.

Sixteenth. That at the time of the disaster, the second mate, by the name of Harding, was in charge of the ship; that he was not a pilot for the waters upon which the ship was then going; and that it was a part of the regular duty of said second mate, and without the aid of a pilot, to take charge of said ship, while on said trips, alternately with the first mate; and that it was an omission of duty on the part of the owner of said steamship, to entrust to said second mate the charge of said ship, especially in the night-time, without the aid of a special pilot; and that said owner should have provided a special pilot or pilots to be at all times on duty upon said ship during said voyage, which said owner failed and neglected to do; and that no pilot was on duty on said ship at the time of the disaster.

Seventeenth. That there was not proper apparatus upon said vessel for the launching of the boats, and that there was an omission of duty on the part of the owner of said vessel in that regard.

Eighteenth. That said ship was not properly constructed in respect to bulkheads and otherwise; and that it was an omission of duty on the part of the owner thereof to allow said ship to proceed to sea with passengers for hire on board without remedying said defects in the construction of the ship.

Nineteenth. That among the persons who were lost and drowned in the catastrophe aforesaid, was the said Elizabeth R. Beach.

Twentieth. That there was unfitness, gross negligence or carelessness on the part of the servants or agents of the said

Steamship Company, who were engaged in navigating the ship at the time of the disaster; and that there was such unfitness, gross negligence or carelessness in the conduct of the said servants or agents, in causing or allowing said steamship to proceed so near the shore, and to strike the bottom; and that there was such unfitness, gross negligence or carelessness on the part of the servants or agents of the said Steamship Company in not taking proper measures to save the passengers by means of the boats, or to provide properly for the safety of the passengers; and that there was unfitness, gross negligence or carelessness, on the part of the servants or agents of the said Steamship Company, as displayed in the inefficiency of the discipline of the officers and crew of the vessel.

Twenty-first. That there was negligence or carelessness of the proprietor of said steamboat, in entrusting said second mate with the charge of said ship, especially in the night-time, without the aid of a special pilot, and in not providing a special pilot or pilots to be on duty at the time the second mate was on duty, and at the time of his having charge of the ship when the disaster occurred; and that there was negligence or carelessness of the said proprietor, in the particulars set forth in the seventeenth (17th) and eighteenth (18th) articles of this answer, petition and exceptions; and in respect to the inefficiency of the discipline of the officers and crew of the vessel, as above set forth.

Twenty-second. That the law of the State of Massachusetts, as contained in the "Public Statutes of Massachusetts," Ch. 73, Sect. 6, is, and at the time of the disaster was, as follows: "If the life of a passenger is lost, by reason of the negligence or carelessness of the proprietor or proprietors of a steamboat or stage-coach, or of common carriers of passengers, or by the unfitness, or gross negligence or carelessness of their servants or agents, such proprietor or proprietors and common carriers shall be liable in damages not exceeding five thousand, nor less than five hundred dollars, to be assessed with reference to the degree of culpability of the proprietor or proprietors, or common carriers liable, or of their servants or agents, and recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or

administrator of the deceased person, for the use of the widow and children of the deceased, in equal moieties; or, if there are no children, to the use of the widow, or, if no widow, to the use of the next of kin.

Twenty-third. That after said vessel struck, said Elizabeth R. Beach suffered great mental and bodily pain and misery upon the vessel, and thereafter fell or was washed into the sea, and drowned.

Twenty-fourth. That said Elizabeth R. Beach, deceased, had clothing upon her person, together with luggage or baggage, all of the value of $150, all of which were lost.

Twenty-fifth. And these respondents and petitioners, without waiving anything hereinbefore contained, further aver as follows: that the Revised Statutes of the United States, § 4401, being an embodiment of Section 51 of the Act of Congress of Feb'y 28th, 1871, namely, 16 Statutes at Large, Ch. 100, Sect. 51, p. 455, provides as follows: "All coastwise, sea-going vessels, and vessels navigating the great lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam vessels in passing as provided by this title; and every coastwise, sea-going steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats;" and they aver that the Revised Statutes of the United States, § 5344, being an embodiment of Section 57 of the Act of Congress of Feb'y 28th, 1871, namely, 16 Statutes at Large, Ch. 100, Sect. 57, p. 456, provides as follows: "Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel, the life of any person is destroyed, and every owner, inspector, or other public officer through whose fraud, connivance, misconduct, or violation of law, the life of any person is destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any Circuit Court of the United States,

shall be sentenced to confinement at hard labor for a period of not more than ten years;" and they aver that Section 43 of said Statute of A. D. 1871, and of said Chapter 100, provides that "whenever damage is sustained by any passenger, or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel or either of them, and the vessel, shall be liable to each and every person so injured to the full amount of damage, if it happens through any neglect or failure to comply with the provisions of law herein prescribed, or through known defects or imperfections of the steaming apparatus, or of the hull;" and they aver that the said Section 43, as embodied in the Revised Statutes of the United States, § 4493, provides that "whenever damage is sustained by any passenger, or his baggage from explosion, fire, collision or other cause, the master and the owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured to the full amount of damage, if it happens through any neglect or failure to comply with the provisions of this title, or through known defects or imperfections of the steaming apparatus or of the hull." And they aver that said Sections 4401 and 4493 are in Title 52 of the Revised Statutes of the United States; and that said Section 5344 is in Title 70 of the Revised Statutes of the United States.

And they further aver that the said steamer "City of Columbus" was, when she ran aground and became a wreck, a coastwise, sea-going steam vessel, subject to the navigation laws of the United States, and was navigating within the jurisdiction thereof, and was subject to all the said rules and regulations specified in said § 4401 of the Revised Statutes of the United States, and in said Section 51; that she was not sailing under register; that when said catastrophe happened she was under way, and was within the waters of the State of Massachusetts, and was not upon the high seas, and that she was not under the control and direction of pilots, or of a pilot licensed by the inspectors of steamboats.

And they further aver, that there was connivance, misconduct or violation of law on the part of the owner of said vessel, in not providing or procuring said vessel to be under the control and direction of a pilot or pilots licensed by the inspectors

of steamboats, as above set forth; and in the other particulars above set forth; and that there was misconduct, negligence, or inattention to his duties, on the part of the captain, second mate, or other person or persons employed on said vessel; and that by such connivance, misconduct or violation of law on the part of the owners, and by such misconduct, negligence or inattention to his duties on the part of the captain, second mate, or other person or persons, employed on said vessel, the life of the said Elizabeth R. Beach was destroyed; and that the damage sought to be compensated in this action, happened, as above set forth, through the neglect or failure to comply with the said provisions of law, or through known defects or imperfections of the hull of said vessel.

And they further aver, that among other misconduct, negligence or inattention to his duties on the part of the captain, it was such misconduct, negligence or inattention to his duties, to entrust the control and direction of the said vessel to the said second mate, who was not a pilot, or qualified or competent to act as a pilot, and who was not licensed as a pilot by the inspectors of steamboats; and that among other misconduct, negligence or inattention to his duties on the part of the said second mate, as is set forth above, there was such misconduct, negligence or inattention to his duties, in accepting or undertaking the control and direction of said vessel, especially in the nighttime. And that there was such misconduct, negligence or inattention to his, or their duties on the part of the servants or agents of said Steamship Company, who were engaged in navigating the ship at the time of the disaster, in causing or allowing said steamship to proceed so near the shore, and to strike the bottom; and in not taking proper measures to save the passengers by means of the boats, or to provide properly for the safety of the passengers, and as displayed in the inefficiency of the discipline of the officers and crew of the vessel.

Twenty-sixth. That by virtue of the premises, and under the general admiralty jurisprudence of the United States, these respondents and petitioners are entitled to recover the sum of fifty thousand dollars ($50,000), and by virtue of the Statute of Massachusetts aforesaid, the sum of five thousand dollars ($5,000).

Twenty-seventh. That all and singular the premises are true.

Wherefore these respondents pray that the said libel of the Boston and Savannah Steamship Company may, at least as to them and their claims, respectively be dismissed, and that they, these respondents, and petitioners, be decreed to be free from any prohibition or injunction restraining them, or either of them, either in an official or a private capacity, from pursuing their causes of action against the said Boston and Savannah Steamship Company; and further, that this Honorable Court would be pleased to condemn the said Company to pay them the damages aforesaid and their costs, and to decree such other relief to them respectively, as shall to law and justice appertain, and as to your Honor shall seem meet.

NATHANIEL BEACH,
ELIZABETH R. BEACH,
ANNA BEACH,
By their Attorney,
JOHN HASKELL BUTLER.

FRANK GOODWIN,
EUGENE P. CARVER,
JOHN HASKELL BUTLER,
Proctors.

JOHN HASKELL BUTLER,
Administrator.

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss.

DECEMBER 15, 1884.

Then personally appeared the above-named John Haskell Butler, and made oath that according to his information and belief the foregoing answer is true.

EUGENE P. CARVER,
Notary Public.

[SEAL].

MOTION.

On the 19th day of January, A. D. 1885, the following motion of J. Haskell Butler, *et als.*, that the Insurance money be paid into Court, was filed in Court, viz.: —

IN ADMIRALTY.

DISTRICT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

IN RE THE LIBEL AND PETITION OF THE BOSTON AND SAVANNAH STEAMSHIP COMPANY.

And now come John Haskell Butler, adm'r; Nathaniel Beach, administrator and in his own right, Elizabeth R. Beach and Anna Beach, and relying upon their answer, petition and exceptions, to the libel and petition of the Boston and Savannah Steamship Company, and not waiving any of the matters in the said answer, petition and exceptions, and referring to the tenth (10th) article thereof, do now move this Honorable Court, that the said Boston and Savannah Steamship Company be ordered to pay into Court the said insurance money, in that their said vessel, the steamship "City of Columbus," in respect to the value of the same, is not lost to the said Company by the stranding and wrecking.

JOHN HASKELL BUTLER,
Adm'r.

NATHANIEL BEACH,
Adm'r and in his own right.

ELIZABETH R. BEACH,
ANNA BEACH,
By their Attorneys,
FRANK GOODWIN,
EUGENE P. CARVER.

FRANK GOODWIN,
EUGENE P. CARVER,
Proctors.

From said December Term, A. D. 1884, this libel was continued to this present term. And on the 10th day of April, A. D. 1885, the following agreed statement of facts, was filed in Court, viz.: —

IN ADMIRALTY.

DISTRICT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

IN RE BOSTON AND SAVANNAH STEAMSHIP CO., *Libellants for limitation of liability.*

JOHN HASKELL BUTLER, *adm'r* ET AL., *v.* BOSTON AND SAVANNAH STEAMSHIP COMPANY.

STATEMENT OF AGREED FACTS.

In above entitled causes the following facts are agreed by the Boston and Savannah Steamship Company and John Haskell Butler, administrator, *et al.*, party excepting to said libel of said Company.

First. All the allegations contained in the eleventh, twelfth, thirteenth, fourteenth, nineteenth, twenty-third and twenty-fourth articles of the answer, petition and exceptions of said John Haskell Butler, administrator, *et al.*, in said suit, are true.

Second. Except as relieved or affected by the Limited Liability Act of 1851 (U. S. Rev. Sts. §§ 4283-5,) and the Rules of the U. S. Supreme Court thereunder, the libellant, shipowner, is liable for all loss and damage caused by the stranding of said steamship "City of Columbus."

Third. In respect to the cause of the disaster alleged, the respondents claim in addition to the concession by libellant, the B. and S. Steamship Company, of negligence on the part of their agents and servants as above agreed; that at the time of disaster the second mate was in charge of the ship; that he was not a pilot for the waters upon which the ship was then going, and was not licensed as a pilot by the inspectors of steamboats; and that no pilot was on duty on said ship at the time of the disaster; and, further, that the disaster was owing to the unfitness, gross negligence, or carelessness of the servants or agents of the libellant, who were engaged in navigating the ship at the time of the disaster, so that the case was within Section 6 of Chapter 73 of the Public Statutes of Massachusetts. The libellant denies all these allegations, and claims that they are immaterial to the issues of the cause, if true; and that the captain was in charge of the ship at the time of the disaster.

Fourth. Said loss and damage were without the privity and knowledge of the libellant, the Boston and Savannah Steamship Company, the sole owner of said steamship.

Fifth. Said steamship was a coastwise, sea-going vessel, under enrollment, and was, at and before the time of loss, subject to all the laws and rules of navigation applicable to such vessels; and at the time of loss was on a voyage from Boston to

Savannah, Georgia, and proceeding through Vineyard Sound, stranding on Devil's Bridge, off and near Gay Head, Martha's Vineyard. And to this extent the respondents, Butler, *et als.*, qualify any admission in their answer to the third article of the libel of the Company; and the Company qualify any averment pertinent thereto in said article.

Sixth. After the filing of the libel or petition in this cause, the Court caused due appraisement to be had of the amount or value of the interest of the libellant, as owner, in such ship and her freight for the voyage, and thereupon made an order for the giving of a stipulation, with sureties for the payment thereof, into Court, whenever the same shall be ordered; and upon due compliance with this order, the Court issued a monition, February 28, 1884, against all persons claiming damages for any such loss, embezzlement, destruction, damage or injury, citing them to appear before the said Court, and make due proof of their respective claims at or before July 1, 1884, and public notice of such monition was given as required; and thereafter, on the application of said owner, the Court made an order to restrain the further prosecution of all and any suit or suits against said owner in respect of any such claim or claims, all as provided in the Admiralty Rules of the U. S. Supreme Court.

Seventh. The Boston and Savannah Steamship Company is a corporation organized under the laws of the State of Massachusetts, and is located at Boston in said State.

C. T. & T. H. RUSSELL,
Proctors for Boston and Savannah Steamship Company.

FRANK GOODWIN,
Proctor for F. Haskell Butler, adm'r, et al.

ANSWER TO MOTION.

On the 10th day of April, A. D. 1885, the following answer of libellant to motion of John Haskell Butler, adm'r, *et al.*, that insurance money be paid into Court, was filed in Court, viz.:—

IN ADMIRALTY.

DISTRICT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

BOSTON AND SAVANNAH STEAMSHIP COMPANY, *Libellant for limitation of liability.*

To Hon. THOMAS L. NELSON, *Judge of said Court:* —

The Boston and Savannah Steamship Company, except and make answer to the motion of John Haskell Butler, administrator, *et al.*, that certain insurance money be paid into Court as follows: —

First. The said Boston and Savannah Steamship Company, after the filing of its libel or petition in this cause, and after this Court had taken jurisdiction thereof, and had caused due appraisement to be had of the amount or value of the interest of said Company, as owner, in said steamship and her freight for the voyage, and had ordered payment or stipulation for the payment thereof into Court, gave a stipulation with sureties for the payment thereof into Court whenever the same shall be ordered. And said Company cannot be ordered to pay into Court any insurance money collected on account of the loss o said steamship or any other, or additional sum whatever.

Second. And further answering and excepting, said Company alleges the facts in regard to all such insurance as follows: —

The said Company, in or about September, 1882, purchased of the Ocean Steamship Company of Savannah, Georgia, the steamships "City of Columbus" and "Gate City," for the sum of $520,000, and in part payment therefor made and executed in proper form, on September 12th, 1882, a mortgage on both said steamships to said Ocean Steamship Company, for the sum of $468,000, to secure the payment of eighteen notes given by said Boston and Savannah Steamship Company to said Ocean Steamship Company, in sums varying from $39,767 down to $26,140, payable at periods six months apart, the first of said notes being payable March 11th, 1883, and the last on September 11th, 1891. All of said notes which have matured have

been paid, leaving the amount of notes outstanding at the time of the loss, $416,000 and interest.

And among other things in said mortgage, the said Boston and Savannah Steamship Company covenanted and agreed as follows:—

"And the said party of the first part (said Boston and Savannah Steamship Company) does hereby covenant and agree with said party of the second part (said Ocean Steamship Company) and its assigns, that it will immediately procure said steamships to be insured against loss or damage by fire, and against all marine risks and disasters in some good and responsible Insurance Company or Companies to be approved by the said party of the second part, for an amount at least equal to the amount which shall from time to time remain unpaid upon the said indebtedness and interest thereon; and that it will keep such policy or policies renewed from time to time, and keep the same valid at all times for the amount aforesaid; that it will do, suffer, or permit to be done no act whereby said insurance would be liable to be vitiated or forfeited; and that it will immediately assign and deliver to said second party such policy or policies of insurance, and the renewed certificates of said policies, having first obtained the proper consent of the Insurance Company or Companies thereto, as a collateral security for the payment of said indebtedness. And if the said party of the first part shall at any time fail to immediately procure, assign and deliver such policy or policies, and the renewal certificates thereof as aforesaid, then the said party of the second part is hereby authorized to procure said steamships to be insured as aforesaid, and to keep the policy or policies renewed; and the amount which it has to pay therefor shall be considered, and is hereby declared to be, an additional indebtedness hereby intended to be secured, and shall be repaid to the said party of the second part or its assigns on demand, and shall bear interest at the rate of six per centum (6%) per annum, from the time of such payment until repaid."

And pursuant to said covenants, such insurance upon each of said steamships was procured by F. W. Nickerson & Co., of Boston, agents of said Boston and Savannah Steamship Company, under time policies, renewed as they expired, from vari-

ous underwriters, — the total amount of such insurance on said steamship "City of Columbus," being to the amount, in Companies in the United States, of $80,000, and with foreign underwriters, of £34,000. All the policies for said insurance, insured "F. W. Nickerson & Co., on account of whom it may concern, in case of loss to be paid to F. W. Nickerson & Co., or order;" and said policies were immediately endorsed by said F. W. Nickerson & Company as follows: "Pay to the Ocean Steamship Company of Savannah, in case of loss, F. W. Nickerson & Co.," and delivered to said Ocean Steamship Company. All said insurance was procured, and all said policies were issued, for the benefit of, and by said endorsement and delivery, were assigned to said Ocean Steamship Company, as such mortgagee.

And after the loss of said steamship, the said Ocean Steamship Company, by its agents, proceeded to collect said insurance under said policies as such mortgagees, and have collected the same, or most of it, to wit, to the amount of about $245,000; and have applied the same to the partial payment of said immatured mortgage notes.

Said Boston and Savannah Steamship Company had no insurance, and none was collected on the freight of said steamship pending for the voyage upon which she was lost; and said Company has collected and received, and was entitled to receive, nothing for insurance upon said steamship, all such insurance having been procured for, and after said loss, paid to said mortgagee.

BOSTON AND SAVANNAH STEAMSHIP CO.,
By ALFRED A. NICKERSON, *President.*

C. T. & T. H. RUSSELL,
Proctors for Libellants.

Subscribed and sworn to by said Alfred A. Nickerson, President of said Boston and Savannah Steamship Company, before me,
CHAS. THEO. RUSSELL, JR.,
[SEAL.] *Notary Public.*

EXCEPTIONS TO SAID ANSWER.

On the 10th day of April, A. D. 1885, the following exceptions and plea of John Haskell Butler, adm'r, *et als.*, to the

answer of the Boston and Savannah Steamship Company, in the matter of the motion that the insurance money be paid in, was filed in Court, and is as follows, viz.: —

IN ADMIRALTY.

DISTRICT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

IN RE THE BOSTON AND SAVANNAH STEAMSHIP COMPANY.

Upon the motion of John Haskell Butler, administrator, *et als.*, that the insurance money be paid into Court.

The exceptions and plea of John Haskell Butler, administrator, *et als.*, to the answer of the Boston and Savannah Steamship Company.

And now John Haskell Butler, administrator, and others, except to the answer filed to their said motion, and for cause, allege that the allegations therein made are not sufficient in law, and set forth no matter in virtue of which said insurance money should not be paid into Court; and further, they allege that the steamer "Gate City," referred to in said answer, is now regularly running between Boston, within this District, and Savannah, Georgia, and is being so run, used and operated by the Boston and Savannah Steamship Company, and that she is enrolled at said Boston, and that said Boston is her home port.

JOHN HASKELL BUTLER, *Adm'r,*
and the others by their Attorneys,

FRANK GOODWIN,
EUGENE P. CARVER,
JOHN HASKELL BUTLER,
Proctors.

FRANK GOODWIN,
EUGENE P. CARVER,
JOHN HASKELL BUTLER.

DECREE.

And now on this 10th day of April, A. D. 1885, the following decree is made and placed on file, viz.: —

This cause was heard on libel and answer, petition and exceptions of John Haskell Butler, administrator, *et al.*, thereto,

and upon agreed facts, and upon the motion of said respondents that insurance money be paid into Court, and libellants' answer thereto, and said respondents' exceptions and plea to said answer. And it is found and decreed by the Court that the libellant is entitled to the limitation of liability for loss of life, and other damage, as claimed in said libel; and that evidence tending to establish the facts, claimed by the respondents in clause *three* of the agreed facts on file, is immaterial, and therefore inadmissible, and that the allegations in the libellants' answer to respondents' motion that insurance money be paid into Court are true; and it is thereupon Ordered, adjudged, and decreed by the Court that the said respondents' exceptions to the libellants' answer to said respondents' motion that insurance money be paid into Court, be overruled, and their said motion denied; and that the exceptions of said respondents to the libel be overruled, and their petition be dismissed.

PRAYER FOR AN APPEAL.

On said 10th day of April, A. D. 1885, the following Prayer for an Appeal is filed in Court by J. H. Butler, *et al.*, and is as follows, viz.: —

IN ADMIRALTY.

DISTRICT COURT OF THE UNITED STATES.

IN RE THE BOSTON AND SAVANNAH STEAMSHIP COMPANY.

And now come John Haskell Butler, administrator, *et als*, upon their answer, petition, exceptions, and their motion touching the insurance money, and their plea and exceptions thereunder, and claim an appeal from the decree of the Court; and they pray that their appeal may be allowed.

By their Attorney and Proctor,

FRANK GOODWIN.

ALLOWANCE OF APPEAL.

And thereupon said appeal is allowed by the Court.

I hereby certify that the foregoing is a transcript of the record of said cause in the District Court, made up pursuant to an agreement of parties on file in said cause.

In witness whereof I have hereto subscribed my name, and affixed the seal of said Court, this twentieth day of April, A. D. 1885.

[SEAL] ELISHA BASSETT,
Deputy Clerk of Dist. Court.

This cause entered as aforesaid at the May term of said Circuit Court, A. D. 1885, was set down for hearing and fully heard by the Court, the Honorable Horace Gray, and the Honorable LeBaron B. Colt, Circuit Judge, sitting.

This cause was thence continued from term to term to this present term, when the following decree is entered: —

DECREE.

And now, on this thirty-first day of July, A. D. 1886, the following decree is made and placed on file, viz.: —

This cause was heard on libel, and answer, petition and exceptions of John Haskell Butler, administrator, *et al.*, thereto and upon agreed facts, and upon the motion of said respondents that insurance money be paid into court, and libellants' answer thereto, and said respondents' exceptions and plea to said answer.

And it is found, ordered, adjudged and decreed by the Court that the decree of the District Court in this cause be, and the same is hereby affirmed, and that the appeal of said respondents is dismissed; that the libellants are entitled to the limitation of liability for loss of life and other damage, as claimed in said libel;

and that evidence tending to establish the facts claimed by the respondents in clause three of the agreed facts on file, is immaterial, and therefore inadmissible, and that the allegations in the libellants' answer to respondents' motion that insurance money be paid into court, are true; and it is further ordered, adjudged and decreed by the Court that the said respondents' exceptions to the libellants' answer to said respondents' motion that insurance money be paid into court, be overruled, and their said motion denied; and that the exceptions of said respondents to the libel be overruled, and their petition be dismissed.

By the Court,

JOHN G. STETSON,
Clerk.

From this decree the said John Haskell Butler, Administrator, *et al.*, Appellants, in open court, claim an appeal to the Supreme Court of the United States, and give good and sufficient security that they will prosecute their appeal to effect, and answer all damages and costs, if they fail to make their plea good, and said appeal is allowed.

A true record:

Attest: JOHN J. STETSON, *Clerk.*

CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

IN RE THE BOSTON AND SAVANNAH STEAMSHIP COMPANY.

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL.

And now come the respondents and appellants, and assign for error that the libellants ought not to be entitled to the limitation of liability for loss of life and other damages, as claimed in their libel; that evidence tending to establish the facts claimed by the respondents in clause three of the agreed facts on file is material and admissible, and that the respondents' exceptions ought not to have been overruled, and that the motion that insurance money be paid into court, ought not to have been overruled, and that said motion should not have been denied; and that the exceptions of said respondents to the libel ought not to have been overruled, and that their petition ought not to have been dismissed; and they pray that the exceptions of the respondents to the libellants' libel may be sustained, and that the respondents' motion to bring the insurance money into court may be sustained, and that the libellants shall be held not to be entitled to the limitation of liability for loss of life and other damages, as claimed in their libel, and that the decree of the Circuit Court be reversed.

By their Attorneys and Proctors,

FRANK GOODWIN.
EUGENE P. CARVER.

UNITED STATES OF AMERICA.

DISTRICT OF MASSACHUSETTS, ss.

I, John G. Stetson, clerk of the Circuit Court of the United States for the First Circuit and District of Massachusetts, certify that the foregoing is a true copy of the record of said Circuit Court in the cause entitled

lately determined in said Circuit Court, and of all proceedings therein, and of the Prayer for reversal and Assignment of Errors filed therein.

In testimony whereof, I hereunto set my hand and affix the seal of the said Circuit Court, at Boston, in said district, this tenth day of August, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

[SEAL] JOHN G. STETSON, *Clerk.*

lately determined in said Circuit Court, and of all proceedings therein, and of the Prayer for reversal and Assignment of Errors filed therein.

In testimony whereof, I hereunto set my hand and affix the seal of the said Circuit Court, at Boston, in said district, this tenth day of August, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

[SEAL] JOHN G. STETSON, *Clerk.*

BOND TO PARTY ON APPEAL.

Know all men by these presents,

That we, John Haskell Butler, administrator, of Somerville, as principal, and Arnold A. Rand, of Boston, and Edward L. Rand, of Cambridge, as sureties, all in the State of Massachusetts, are held and firmly bound unto Boston and Savannah Steamship Company, a corporation duly organized under the laws of the State of Massachusetts, in the full and just sum of two hundred dollars, to be paid to the said Boston and Savannah Steamship Company, a corporation organized under the laws of the State of Massachusetts, its certain successors, attorneys, executors, administrators or assigns: to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the second day of August, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas, lately at a Circuit Court of the United States, within and for the District of Massachusetts, in a suit in admiralty depending in said Court between the said Boston and Savannah Steamship Company, libellants and appellees, and the said John Haskell Butler, administrator, and Nathaniel Beach and Elizabeth R. Beach, both of Mansfield, State of Connecticut, and Anna Beach, of Newark, New Jersey, respondents and appellants, a decree was rendered against the said respondents and appellants, and the said respondents and appellants having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Boston and Savannah Steamship Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next.

Now the condition of the above obligation is such, that if the said John Haskell Butler, administrator, Nathaniel Beach, Elizabeth R. Beach and Anna Beach, respondents and appellants, shall prosecute their said appeal to effect, and answer all damages and costs, if they fail to make their plea good, then the

above obligation to be null and void; otherwise to remain in full force and virtue.

Signed, sealed and delivered in presence of

JOHN HASKELL BUTLER. [SEAL]
ARNOLD A. RAND. [SEAL]
EDWARD L. RAND. [SEAL]

Approved:

LEBARON B COLT,
U. S. Circuit Judge.

A true copy of the bond taken by the Judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the Circuit Court of the United States, for the First Circuit and District of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

Supreme Court of the United States.

JOHN HASKELL BUTLER, ADMINISTRATOR, *et al.*,
LIBELLANTS, APPELLANTS,

v.

THE
BOSTON AND SAVANNAH STEAMSHIP COMPANY,
RESPONDENTS, APPELLEES.

JOHN HASKELL BUTLER, ADMINISTRATOR, *et al.*,
RESPONDENTS, APPELLANTS,

v.

THE
BOSTON AND SAVANNAH STEAMSHIP COMPANY,
LIBELLANTS, APPELLEES.

FRANK GOODWIN,
EUGENE P. CARVER,
For John Haskell Butler, Admr., et al.

BOSTON:
T. O. METCALF & CO., PRINTERS.
1889.

Supreme Court of the United States.

JOHN HASKELL BUTLER, ADMINISTRATOR, *et al.*,
LIBELLANTS, APPELLANTS,
v.
THE
BOSTON AND SAVANNAH STEAMSHIP COMPANY,
RESPONDENTS, APPELLEES.

JOHN HASKELL BUTLER, ADMINISTRATOR, *et al.*,
RESPONDENTS, APPELLANTS,
v.
THE
BOSTON AND SAVANNAH STEAMSHIP COMPANY,
LIBELLANTS, APPELLEES.

A concise abstract or statement of these cases, or of this case, in its two branches, is as follows: —

The steamship "City of Columbus," owned by the Boston and Savannah Steamship Company, a corporation organized under the laws of Massachusetts, and located at Boston, was a passenger and freight steamship, plying between Boston and Savannah. While on a voyage from Boston, bound to Savannah, she was wrecked, in January, A.D. 1884, on the coast of Martha's Vineyard, Massachusetts, while proceeding through

Vineyard Sound. Miss Elizabeth R. Beach took passage on her at Boston, and contracted with the company at Boston to be carried in her to Savannah, and thence by land to St. Augustine, Florida. About one hundred of the persons on board the vessel were lost and drowned, among whom was Miss Beach. Nathaniel Beach, one of those libelling the Boston and Savannah Steamship Company, was duly appointed the administrator of the estate of Miss Beach in the State of Connecticut, and ancillary administration was taken out in Massachusetts by John Haskell Butler, also one of those libelling the Boston and Savannah Steamship Company. Nathaniel Beach was the father of the deceased.

On the eighteenth day of February, A.D. 1884, the company filed, in the U. S. District Court, District of Massachusetts, a libel, seeking to limit its liability, and obtained a restraining order, restraining the prosecution of suits against the company for loss (Record, libel of Boston and S. S. S. Co., pp. 1 *et seq.*, and 20. Record libel of Butler *et al.*, p. 9). On the twenty-seventh day of September, A.D. 1884, the said Butler, the said Nathaniel Beach, Elizabeth R. Beach, niece of the deceased, and dependent upon the deceased for her support, and Anna Beach, aunt of the deceased, brought a libel *in personam* against the said company for damages for the mental and bodily suffering and for the death of Miss Beach, and alleged negligence in the manner declared upon by them in their libel, and relied among other things upon a Statute of Massachusetts furnishing a remedy for the death of a passenger, which Statute is fully set forth (*infra*) on this brief, and in the pleadings (Record, libel of Butler *et al.*, pp. 2–6: *ib.* replication, pp. 11–13). To this libel, the company, by exception and plea (Record, libel of Butler *et al.*, pp. 7–10), set up the proceedings, which had been taken by them to limit their liability under their libel. The District Court, upon a hearing upon the said libel of Butler *et al.*, the respondent's exceptions thereto, and upon agreed facts, because of the libel brought to limit liability and the restraining order there under, dismissed the libel of Butler *et al.* On appeal, the Circuit Court also, upon the said pleadings and agreed facts, affirmed the decree of the District Court, dismissed the appeal and dismissed the libel; and from that decree this appeal was taken to the Supreme Court of the United States.

The agreed facts in this Record (see Record, libel of Butler *et al.*, p. 14) are to the effect that, but for the Limited Liability Act, the company is liable for all loss and damage caused by the stranding; that the respondent claims that the captain was in charge of the ship at the time of the disaster; that the loss and damage were without the privity and knowledge of the company itself; and that the steamship was a coastwise, sea-going vessel, under enrollment, and at the time of the loss was on a voyage bound from Boston to Savannah, and proceeding through Vineyard Sound, stranded near Gay Head, Martha's Vineyard. Vineyard Sound is Massachusetts water.

The single question thus presented is, whether the Act limiting the liability of ship owners applies to damages for personal injury and damages for loss of life, and thus deprives those entitled to damages of the right to entertain suit for recovery, provided that the ship owner has taken appropriate proceedings by libel or petition to limit his liability: in other words, whether the said Act extends at all to damages for personal injury, and damages for loss of life.

In a separate proceeding and by another Record the persons who had brought a libel against the company, as above mentioned, filed, to the libel brought by the company to limit its liability, an answer which comprehended exceptions, which denied the jurisdiction of the Court in applying a limitation of liability to their claims, and which contained likewise a petition. This was filed December 16, 1884 (Record, p. 8).

The libel brought by the company, and the answer, petition, and exceptions thereto, are contained in that other Record (see libel of the company, pp. 2–8. See answer, petition, and exceptions, pp. 8–17).

The tenth article of the answer, petition, and exceptions (see that Record, p. 10) contains an averment that there was a substantial insurance upon the steamship and pending freight. After the said answer, petition, and exceptions had been filed, Butler *et al.* filed a motion, relying upon said averment, that the company be ordered to pay the same into Court (Record, p. 18). This motion the company answered (Record, pp. 20–23), and Butler *et al.* filed exceptions to said answer (Record, pp. 23, 24). The agreed facts in this Record admit the eleventh, twelfth,

thirteenth, fourteenth, nineteenth, twenty-third, and twenty-fourth articles of the said answer, petition, and exceptions (Record, pp. 19, 20), and further cover the same ground as that covered by the agreed facts in the other Record above mentioned; and agree to the facts of the proceedings taken under the company's libel to limit its liability, and to the restraining order thereunder; and that the company is a Massachusetts corporation located at Boston. But they do not admit the matters referred to in the third clause of such agreed facts.

This case was heard on the libel, answer, petition, exceptions, and agreed facts, and upon the motion that the insurance money be paid into Court, and the said pleadings thereunder, and the Court denied the motion, overruled the exceptions to the libel, and dismissed the petition (Record, pp. 24, 25). The prayer of the answer and petition was (see Record, p. 17) that the libel of the company seeking to limit its liability, be, as to the respondents the said Butler *et al.*, dismissed; and that they, the said Butler *et al.*, be free from any prohibition or injunction restraining them, or either of them, either in an official or a private capacity, from pursuing their causes of action against the company, and to condemn the company to pay them the damages by them claimed, and costs, and for general relief.

The questions thus presented involved, in addition to the main question above stated, namely, whether the Act limiting the liability of ship owners applies to damages for personal injury and damages for loss of life, this further question, that, provided said Act does cover damages of that character, whether the insurance money should not be paid into Court. On appeal from the decree of the District Court, the Circuit Court also, upon the said pleadings and agreed facts, affirmed the decree of the District Court (Record, pp. 26, 27), and made a decree in identical words; and from that decree this appeal was taken to the Supreme Court of the United States (Record, p. 27). It should be mentioned that the statement in the said Record, containing the answer, petition, and exceptions, on the twenty-sixth page thereof, that that branch of the case, or that case, was heard by his Honor, Mr. Justice Gray, on the circuit, is incorrect. But the case, as contained in the other Record, and wholly upon that Record, that is, upon the pleadings and

agreed facts, was heard by Mr. Justice Gray and Judge Colt, as set forth on that other Record, p. 15.

The said Butler, administrator, *et al.*, now say and specify as error, that the independent libel by them brought should not have been dismissed, but that they should be allowed to maintain the same, notwithstanding the proceedings taken by the Boston and Savannah Steamship Company for the limitation of its liability, and that they are entitled to recover their full damages.

The said Butler, administrator, *et al.*, now further, by way of specification say, that if they be not allowed to maintain their independent libel, because of the proceedings taken by the Boston and Savannah Steamship Company for the limitation of its liability, then that their petition brought under the libel of that company should not have been dismissed, and that their application that the insurance money be paid into Court should have been allowed.

We will first consider the question whether the Act of Congress, providing for the limitation of the liability of ship owners (U. S. Rev. Stat. §§ 4,282 to 4,287), applies to a claim for the loss of life of a passenger, or for injuries suffered by him, through the negligence of the servants or agents of the vessel engaged in navigating or operating her. The first question here to be considered involves, therefore, the inquiry whether the libel of the Boston and Savannah Steamship Company, and whether the fact that the loss and damage were without the privity and knowledge of that company (Record, libel of Butler *et al.*, agreed facts, p. 14; Record, libel of Boston and S. S. S. Co., agreed facts, p. 19) can operate to prevent these libellants who sue for loss of life and for personal injury and suffering of a person being carried as a passenger by that company, from

maintaining their suit; and, further, whether in case of success in promoting their suit they can be prevented from obtaining a final decree for damages and costs, and an execution therefor.

The first inquiry, therefore, involves the libel of that company, together with the petition, exceptions, and answer of these other libellants thereto, also the libel filed by these other libellants, and the exceptions and plea of the Boston and Savannah Steamship Company, taken and made to the same.

The question thus presented does not involve that of the right of these libellants, if successful, to share in the security given upon the libel of the company. That question would appear to be separate from any now presented.

It is unnecessary to do more than allude to the principle, applied in its full force amongst us, and as firmly set into our institutions as any fundamental rules of our system, that the law most tenderly regards the rights of passengers who are carried by common carriers, and holds the carrier to the highest degree of care possible, and requires him to make good all damages suffered through want of that care.

Penn. Co. *v.* Roy, 102 U. S. 451.

We therefore say that any Statute claimed to be in derogation of these fundamental principles must necessarily be so expressed as plainly to show that this great rule of the law and of public policy is in terms and purpose departed from. If a passenger suffers injury in a railroad disaster the company must pay. If it be not at all the company's fault, but be owing to a latent defect, yet however difficult or impossible it may be to show that, the company must pay, if unable to prove it. Indeed, common carriers have always been held to a very strict accountability even in the carriage of merchandise; but the rigor of the law in regard to their obligation to passengers finds no parallel elsewhere within the domain of jurisprudence. It is as perfect and entire as human law can make it. The Act limiting liability had its origin in an attempt to diminish the risks of ship owners engaged in commerce, that is, in the business of transporting cargoes, and it was adopted exclusively with reference to that; and any claim that the Limitation Act infringes the entire remedy of passengers against the common carrier is untenable.

It is not understood that travellers by sea are less under the protection of the law than are those by land. Even if at the common law a discrimination should be made in throwing around travellers by land a larger measure of protection than is afforded to those who travel by sea, which is not the case, yet it is the province and function of a Court of Admiralty especially to guard and protect all persons who commit themselves to the care of a common carrier by water. The solicitous watchfulness and care of that Court in this respect is expressed by Chief Justice Chase, in the "Highland Light," Chase's Dec. 152, in these words: "The admiralty may be styled, not improperly, the human providence which watches over the rights and interests of those 'who go down to the sea in ships, and do their business on the great waters.'"

We submit that the Act of Congress limiting the liability of ship owners has no application in respect to passengers upon the vessel, which is all that the decision of these cases calls for; but we go further and submit that that Act has no extension beyond liabilities for loss of property, and that it cannot be strained to apply to persons at all.

Then again, if the Act of Congress has no application in respect to passengers upon an uninsured vessel, for the greater reason it should have no application if the vessel be insured. Indeed, if the Act could be held to give immunity from liability to the owners of an insured vessel, there would be a premium in case of disaster upon the destruction of the vessel. It would become expedient for the owners to issue quiet instructions to their captains that where loss of life from disaster was probable, as in case of fire, or perhaps other forms of peril at sea, to let the elements have their way; for then a full insurance may be recovered, and no damages to pay; whereas, if the vessel be saved, the owners, upon familiar principles of marine insurance law, must stand one-third of the repairs, and must, in addition, indemnify the passengers who have survived, and the next of kin of those who have perished, in large damages. Certainly, if such were the law, life would be in peril indeed upon the great waters. One question then is, whether these owners, because their vessel is destroyed, can evade their responsibility for damages which they owe, while they sit by with a full indemnity for their lost vessel in their pockets.

Neither by the civil law nor the common law was there or is there a limitation of liability. The principle of such limitation appears to have arisen in the Middle Ages, and the origin thereof is set forth by Judge Ware in the case of the "Rebecca," Ware 187; and Judge Ware's exposition has been accepted by the Supreme Court in Norwich Co. *v.* Wright, 13 Wall.

That the Courts of the United States, down to the Act of 1851, did not recognize the rule of the ancient or general maritime law, but refused to adopt it either in admiralty or common law, see

Del. Col. *v.* Arnold, 3 Dall. 333.
The "Amiable Nancy," 1 Paine, 111, 118.
Pope *v.* Nickerson, 3 Story, 465, 480, 492.
Hall *v.* Washington Ins. Co., 2 Story, 176.
N. Y. Steam Nav. Co. *v.* Merchants' Bank, 6 How. 435.

The adoption of limitation in England by 7 Geo. 2d, Ch. 15, was followed by the two Statutes of Geo. 3d; namely, 26 Geo. 3d, Ch. 86, and 53 Geo. 3d, Ch. 159. These three Acts were repealed in 1854 (17 and 18 Vict., Ch. 120), and the existing law on the subject was consolidated in the Act of 1854 (Ch. 104), and the amendment thereto of 1862 (25 and 26 Vict., Ch. 63, § 54).

The Statute of Geo. 2d and the two Statutes of Geo. 3d, being merely regulations of commerce, made no provision for loss of life or personal injury; but, in 1854 it was provided (Ch. 104, § 504) that "No owner of any sea-going ship or share therein shall in cases where all or any of the following events occur without his actual fault or privity," among other things, "where any loss of life or personal injury is caused to any person being carried in such ship," also, among other things, "where any loss of life or personal injury is by reason of the improper navigation of such sea-going ship, as aforesaid, caused to any person carried in any other ship or boat," "be answerable in damages to an extent beyond the value of his ship and the freight due or to grow due," etc., "subject to the following proviso; that is to say, that in no case where any such liability, as aforesaid, is incurred in respect of loss of life or personal

injury to any passenger, shall the value of any such ship and the freight thereof be taken to be less than £15 per registered ton." And § 506 provides that "The owner of every sea-going ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to goods, as aforesaid, arising on distinct occasions, to the same extent as if no other loss, injury, or damage had arisen."

Section 504 was by the Act of 1862 superseded, and there was substituted for it, "The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say, (1) "where any loss of life or personal injury is caused to any person being carried in such ship," and among other things, (3) "Where any loss of life or personal injury is by reason of the improper navigation of such ship, as aforesaid, caused to any person carried in any other ship or boat," "be answerable in damages in respect of loss of life or personal injury, either alone or together, with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding £15 for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding £8 for each ton of the ship's tonnage."

Now, it must be observed, in comprehending these Statutes of 1854 and 1862, that they are passed in the light of the settled English rule of adjudication, that the value of the ship and freight is the value before the damage; so that no other hardship can fall upon the passenger by the operation of the Act than the misfortune of having embarked upon a craft of small tonnage, or with a plentitude of goods or passengers.

An account of this subject is to be found in Maclachlan on Shipping (ed. 1880), pp. 118–124, and p. 127.

The history of the subject shows that the scope of the Act of Congress is confined to advancing the interests of commerce and trade,—the transportation of merchandise.

The first Statute on this subject in this country was enacted in Massachusetts in 1818–19; and it is derived from the English Statute of 7 Geo. 2d, Ch. 15. In 1821 the Massachusetts Statute was adopted by Maine, the latter State copying the former nearly exactly. In 1836 the Statutes of Massachusetts were revised, and in 1840 those of Maine were revised; and the provisions of the Revised Statutes of Massachusetts were copied almost word for word, and with a slight addition which is immaterial here. The Supreme Judicial Court of Massachusetts has declared (Walker *v.* Boston Ins. Co., 14 Gray, 298) that the Statute of the United States of 1851 (the one in question) is almost a literal copy of the Massachusetts Statute; and the differences between the two are trivial, except in so far as the Act of Congress takes from the English Act of 26 Geo. 3d, Ch. 86, which it does in the matter of exemption from liability for fire, and in the provisions as to shipments of precious articles, as gold, etc. But neither of these matters is pertinent here. As to the provisions of the Massachusetts Act of 1818, it is expressly declared therein to be for the encouragement of trade and navigation; and such is in terms declared to be the purpose of the Act of Geo. 2d, while articles of merchandise, including valuables, as gold, etc., are the things within the contemplation of the Act of Geo. 3d, above mentioned. The Massachusetts Supreme Judicial Court has said (Walker *v.* Boston Ins. Co., 14 Gray, 298) that it is not unreasonable to infer, from the close similarity of the provisions of the Federal Act with those of the Act of this Commonwealth, that the same purpose was in view in the enactment of the Act of Congress. Thus, a reference to the original Massachusetts Statute is indispensable to the elucidation of this subject. The Massachusetts Statute of 1818, Ch. 122, recites that, "Whereas it is of the greatest consequence to this Commonwealth, and to the United States, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein; and whereas it has been held that owners of ships or vessels are answerable for goods, wares, and merchandise shipped on board the same, although the said goods, wares, and merchandise should be embezzled," etc. There is not a word to imply an

intention to do other than further commerce and trade; and the whole Statute deals only with goods, wares, and merchandise. This Statute of 1818 was very much simplified in 1836 in the Revised Statutes, but no change was made affecting any construction involved in this question. And the law of Massachusetts was contained in these Revised Statutes when the Act of Congress was passed. In none of these Statutes, English or American, is there any reference to anything but goods, wares, and merchandise.

So also the Act of 7 Geo. 2d, Ch. 15, recites that "whereas it is of the greatest consequence and importance to this kingdom to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein; and whereas it has been held that in many cases owners of ships or vessels are answerable for goods and merchandise shipped or put on board the same, although the said goods and merchandise, after the same have been so put on board, should be made away with by the masters or mariners of the said ships or vessels, without the knowledge or privity of the owner or owners, by means whereof merchants and others are greatly discouraged from adventuring their fortunes as owners of ships or vessels, which will necessarily tend to the prejudice of the trade and navigation of this kingdom; therefore," etc., etc.

The Statute of 53 Geo. 3d, Ch. 159, in terms extends the limitation to "goods, wares, merchandise or other things, being in or on board of any other ship or vessel." This Statute contains several provisions, among others one for bringing a bill in equity in case the value shall not be sufficient to make full compensation to all, as does the Statute of 26 Geo. 3d; but none of those provisions are material here except one, to be mentioned hereafter, and that only incidentally, touching the case of the master, etc., being an owner.

Prof. Parsons (2 Pars. Ship. and Adm. 121) refers the Act of Congress to the Revised Statutes of Maine of 1840, and the Act of 26 Geo. 3d. But we think, upon a very careful comparison, that the Act of Congress is not drawn from the Massachusetts through the Acts of Maine, but directly from the legislation of Massachusetts. But as Maine took from Massachusetts, the

distinction is immaterial, although upon examination we found the correspondence with Massachusetts rather more literal than the correspondence with Maine. Upon this point, however, a writer in the *American Law Review* for July, 1867 (1 *Am. Law Review*, 604), makes the same statement as that of Prof. Parsons; but the question is not a material one, as the Maine Statute was copied from the Massachusetts Statute.

The continuity between the Acts of Massachusetts and Maine and the Act of Congress, forming one chain in a system of legislation, is also recognized and enforced by the Supreme Court of the United States in Norwich Co. *v.* Wright, 13 Wall. 104, which we refer to fully further on.

The Limited Liability Act is not to be extended, even in respect to goods, by construction. Mr. Justice Curtis held that it does not protect a vessel when the fire, which had burned up the goods, destroyed them after they had been landed from the vessel, and were on the wharf, in a case where there had been no delivery to consignee. Its application, in respect to fire, is only to goods lost or damaged through fire happening to or on board of the vessel.

Salmon Falls Mang. Co. *v.* the "Tangier," 6 *Am. Law Register*, 504, 510.

See also

King *v.* Am. Trans. Co. (U. S. C. C., N. D. of Ohio), 1 *Western Law Monthly*, 186 (s. c.); 1 Flip., C. C. 1.

See also

The "Egypt," 25 Fed. Rep. 320.

In the "Mamie," 5 Fed. Rep. 813, sustained on appeal in 8 Fed. Red. 367, a pleasure yacht, chartered to a third person for hire, and carrying passengers, was held not to come under the Limited Liability Act. See the "Mamie," 105 U. S. 773, where the question was as to the jurisdiction of the Supreme Court, as measured by the pecuniary value (see also 110 U. S. 742; Gibson *v.* Shufeldt, 122 U. S. 32, 33).

The case of Carroll *v.* Staten Island R. R. Co., 58 N. Y., 126, is a decision of the New York Court of Appeals made in 1874. The action was to recover damages for personal injuries sustained by the plaintiff, occasioned by the explosion of the boiler upon the defendant's steam ferry boat, the "Westfield," which plied between the city of New York and Staten Island. The plaintiff was a passenger thereon. The Court says (p. 137), "The plaintiff went upon the 'Westfield' in the execution of an unlawful purpose (traveling on Sunday, contrary to the Statute), but he was there upon invitation, and with the license of the defendant, and was injured by the culpable negligence of its servants."

The case assumes that the engineer allowed too great a pressure of steam. The Court refers to the Acts of Congress of 1838 (5 Stats. at Large, 304), of 1852 (10 Stats. at Large, 61), and that of 1871 (16 Stats. at Large, 440), which covers the whole subject, and was in force at the time of this disaster. The forty-third section of the latter Act provides for liability of the master, owner and vessel, or either of them, for damage through failure to comply with the provisions of the law. It was contended by the defendant that the liability of the owner, under that section, was confined to cases where he was chargeable with personal default or neglect in not complying with the Act, in distinction from that of the employes of the vessel. The Court held otherwise, and held that the Act of 1871 was not to be construed in the light of the Act of 1851, limiting the liability of ship owners; that these two Acts were enacted for different purposes and objects, and one of them could not be used to aid the interpretation of the other; that the Act of 1851 is to be applied to goods, and that of 1871 to passengers. The Court says (p. 142), "The Act of March 3, 1851 (9 Stats. at Large, 635), to limit the liability of ship owners, etc., does not aid the defendant. That Act was passed for the encouragement of American ship building, and to enable American ship owners to compete in the carrying of goods with English ship owners, who enjoyed under English Statutes the same exemptions from liability which were extended to the owners of American vessels by the Act of 1851 (Walker *v.* Transportation Co., 3 Wall. 153). This Act and the Act of 1871 did not have their origin in the

same policy, nor were they designed to accomplish similar objects; and a narrow construction in favor of ship owners, of a Statute enacted to secure the safety of passengers, is not justified on the ground that their common law liability as carriers of goods had, by a prior Statute, made for the purpose of assimilating our legislation on the subject to that of England, been to some extent limited." All the judges concurred except Folger and Rapallo, JJ., not voting.

And see the decision of the Court of Common Pleas of New York in

Haegi *v.* Prov. and N. Y. S. S. Co., 54 How. Pr. Rep. 146.

In Dougan *v.* Champlain Trans. Co., 56 N. Y. 6, an earlier case, the decision was that the Limited Liability Act does not deprive the State Court of jurisdiction over the suit against the owner of the steamboat. The case contains no discussion as to the applicability of the Act to cases of loss of life or personal injury.

Anything contained in (an earlier case, and in a lower court) Chisholm *v.* Northern Trans. Co., 61 Barb. 363 (Supreme Court of New York), not in harmony with Carroll *v.* Staten Island R. R. Co. (*supra*), is of course superseded by the latter decision.

In Chamberlain *v.* Western Trans. Co., 44 N. Y. 305 (a decision of the commission of appeals), the privilege of the Act was held to extend to bar out claims for loss of baggage by fire. A similar decision was made in the Massachusetts district in Wallace *v.* Providence and Stonington Steamship Co., 14 Fed. Rep. 56.

The word "Merchandise," as used in § 4,282, U. S. Rev. Stat., is not regarded by Brown, J., of New York, as covering horses, trucks, and harness in charge of the drivers who were passengers on board the steamer. He brings such property into the category of baggage (the "Garden City," 26 Fed. Rep. 769, 770. See also 33 Fed. Rep. 69).

The liability of owners is not restricted by the Act of Congress providing for the security of passengers on steamboats, and their liability is not confined to the acts of omission or commission therein declared to be negligent. The Act does not operate to take away any common law liability.

Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 292.
Swarthout *v.* New Jersey Steamboat Co., 48 N. Y. 209.
Curran *v.* Cheeseman, 1 Cinc. (Ohio), 52.
Carroll *v.* Staten Island R. R. Co., 58 N. Y. 141.
Navigation Co. *v.* Dwyer, 29 Tex. 383.

There are a few decisions beside that of Judge Benedict in the "Epsilon," 6 Ben. 378 (to be referred to later), in which the Limited Liability Act has been extended beyond cases of property; and, with the exception of the Rhode Island case (*infra*), they are, all of them, District Court cases, or the decisions of District Court judges; and this Rhode Island case, together with most of the others, merely imports to follow the decision of Judge Benedict in the "Epsilon" as the authority upon the questions.

These cases are the following:

In re Long Island, etc., Trans. Co., 5 Fed. Rep. 599, 624, by Judge Choate of New York;

and

The "Alpena," 8 Fed. Rep. 280, by Judge Blodgett of Illinois.
Rounds *v.* Providence, etc., S. S. Co., 14 R. I. 344.
The "Amsterdam," 23 Fed. Rep. 112 (by the District Court, Southern District of New York).
Briggs *v.* Day, 21 Fed. Rep. 727, 728, 730, 731 (by the District Court, Southern District of New York).

See also

Craig *v.* Continental Ins. Co., 26 Fed. Rep. 798.

An examination of these cases will show that the distinction between injury to a passenger and injury to a member of the public, toward whom the ship owed no peculiar obligation, has not always been observed in following the decision in the "Epsilon." The "Epsilon" was not the case of a passenger, but of a man killed by the explosion of the vessel's boiler, while he was on land, standing on a pier. There is nothing in the case to show that other persons on board were passengers (see *ex parte* Phœnix Ins. Co., 118 U. S. 610. Johnson *v.* Chicago and Pacific Elevator Co., 119 U. S. 397).

See, further, Judge Blodgett in the "Favorite," 12 Fed. Rep. 213; but in another report of the same case, 11 Biss. 283, he does not in his opinion refer to the fact that a libel had been filed for loss of life.

As to Judge Blodgett's decision: the "Seabird" to which Judge Blodgett refers in the "Alpena," 8 Fed. Rep. 286, *ib.* 10 Biss. 444, is not reported (see note 10 Biss. 444, also Rapalje's and Lawrence's Judicial Criticisms, etc., p. 640), and thus we are left without any reasons for that judge's opinion upon this question; for in the "Alpena" he merely states that he has not changed his view.

In Providence and Stonington Steamship Co. *v.* Clare, admx., 127 U. S. 45, which was an action at law, originally brought in a State Court and removed to the U. S. Circuit Court on the ground of citizenship, and brought under State Statutes both of New York and Connecticut, by an administratrix, to recover for the loss of life of the intestate, claimed to have been a passenger on a steamship owned by the defendant, the defendant among other defences set up that it had taken proper proceedings in a United States District Court to limit its liability, in which it had transferred its interest to a trustee appointed by the Court. But the Supreme Court did not notice this defence, except to remark in the opinion (p. 48) that it was taken in the answer; and it does not appear that this defence was insisted upon at the trial of the case. The case was decided by the Circuit Court in favor of the plaintiff; and the Supreme Court ordered a new trial upon questions having no connection with the Limited Liability Act. There is nothing in the case having any tendency to show that any objection was made to the proceeding on the State Statutes.

The decision of Judge Benedict in the "Epsilon" (*supra*) rests upon two grounds: First, *the words of the Act of Congress:* Second, *the Continental Codes.*

As to the force to be given to those words, that is answered by the history of the subject, which is here invoked with peculiar force (and see Siemens *v.* Sellers, 123 U. S., pp. 285, 286).

As to the Continental Codes, the case of the "Lottawanna," 21 Wall., is instructive upon that subject.

The words of the United States Statutes (U. S. Rev. Stat.

§ 4,283) are, "The liability of the owner of any vessel, for any embezzlement, loss or destruction, by any person of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, lost, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

The words of the United States Statute of 1851, Ch. 43, § 3, from which the Revised Statutes are taken, are as follows: "That the liability of the owner or owners of any ship or vessel, for any embezzlement, loss or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners, respectively, in such ship or vessel, and her freight then pending." The differences between these two expressions of the law are apparently mostly formal; but there is one change which may be substantial.

The form in the Revised Statutes omits the plural of owner, and the word "ship," and comprehends the persons offending, under the phrase, "by any person." But one substantial change seems to have been made. Instead of the word "loss," in the phrase, "act, matter or thing, loss, damage or forfeiture," in the Act of 1851, we have in the Revised Statutes the word "lost" substituted. Omitting the mere punctuation mark after the word "thing," we get as the present expression of the law, "thing lost;" and if this was an intentional change, it shows the more clearly the intention to apply the Act to things, and not to persons. Indeed, the adjective "lost" can have no signification, except as connected with "thing."

Again, these words, with the exception of the collision clause, which has been interpolated, and the word "loss" or "lost," which has also been interpolated, are the identical words

of the original Act of 7 Geo. 2d, Ch. 15. The language there is, "any loss or damage by reason of any embezzlement" . . . "of any gold," . . . "or other goods or merchandise which" . . . "shall be shipped, taken in or put on board any ship or vessel, *or for any act, matter or thing, damage or forfeiture, done, occasioned or incurred,*" etc.

And the Massachusetts Act of 1818, Ch. 122, has identically the same words, "*or for any act, matter or thing, damage or forfeiture, done, occasioned or incurred.*"

Certainly, in the light of these facts, there can be no doubt what force, and just what force, is to be given those words, so much relied on to strain the meaning of the Act to an extension not comprehended or conceived by its makers.

Although the word COLLISION makes its first appearance in the Act of 1851, yet the application to collision was in effect a part of the Act of 53 Geo. 3d, as that Act extends the exemption from liability to the case of damages which "may happen to any other ship or vessel, or to any goods, wares, merchandise or other things, being in or on board of any other ship or vessel"; and so it is declared by the Court in Norwich Co. *v.* Wright, 13 Wall. 118.

As to the word "lost," it is true that the rules of the Supreme Court, promulgated in 13 Wall. XII., contain the word "loss"; and Mr. Justice Blatchford, in quoting the same in *ex parte* Phœnix Ins. Co., 118 U. S. p. 621, quotes the word "loss," as he does also on p. 616, in quoting the Statute (see also Goodrich Trans. Co. *v.* Gagnon, 36 Fed. Rep. 126, 127); but the word "lost" is in the original edition of the Revised Statutes, and was not changed by the amendatory Acts which are embodied in the Revision as it now stands,— the ultimate Revision of A.D. 1878. But the rule of construction in such cases has been declared in U. S. *v.* Bowen, 100 U. S. 513; it is this: "The Revised Statutes must be treated as the legislative declaration of the Statute law on the subjects which they embrace, on the first day of December, 1873. When the meaning is plain, the Courts cannot look to the Statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress." In that case the word "such" had

been interpolated in the Revision, which altered the meaning of the Statute as it stood prior to the revision; but, as the language of the Revision was plain, the Court construed the law as it read in the Revision. So, also, in Cambria Iron Co. *v.* Ashburn, 118 U. S. 57. And so here, the word "lost" as here used is entirely plain. There is nothing doubtful in the language as it stands. And furthermore, and in addition, we say, that in the light of the history of these Statutes it is fairly inferrible that this was an intentional change. But, however that may be, the meaning of the Revision is plain. See further,

The "Montana," 22 Fed. Rep. 729.
Thommassen *v.* Whitwill, 12 Fed. Rep. 903.
The "Marine City," 6 Fed. Rep. 413.
McDonald *v.* Hovey, 110 U. S. 628–630.
Pentlarge *v.* Kirby, 20 Fed. Rep. 900.

Then again, the Act of March 9, 1878, Ch. 26 (20 Stats. at Large 27), which provides that the edition of the Revised Statutes of 1878, authorized by the Act of March 2, 1877, Ch. 82 (19 Stats. at Large 268), "Shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original Act as passed by Congress, since the first day of December, 1873," may imply that an additional value is to be attached to the text of the Revision of 1878, so far as all Acts preceding December, 1873, and which were repealed by the original edition of the Revised Statutes (that is, by Rev. Stats. § 5,596), are concerned.

These general words, "or for any act, matter, or thing," etc., are, upon familiar principles, to be referred to the context; namely, "any property, goods, or merchandise"; for when, in a Statute, general words follow particular ones, the rule is to construe them as applicable to subjects *ejusdem generis.*

2 Parsons on Contracts (7th ed.), 501, N. (W.)
"Alabama" *v.* Montague, 117 U. S. 609–611.

Moore *v.* Am. Trans. Co., 24 How. 36.

Revised Statutes, § 4,289 (the last section) of the Limited Liability Act, *construed in this last case*, providing that the Act "shall not apply to the owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation."

It has been argued by counsel for the Boston and Savannah Steamship Company, that loss by fire is construed as coming under § 4,283, although provided for in an earlier section,—citing Providence and N. Y. S. S. Co. *v.* Hill Manufacturing Co., 109 U. S. 578. But fire is damage to goods or any property; that is, *something of the same kind,—ejusdem generis.*

Since the decision of this Court in *ex parte* Phœnix Ins. Co., 118 U. S. 610 (s. c. 26 Fed. Rep. 713), Mr. Justice Harlan, on the Circuit, has had the same cause before him in a new form. In *ex parte* Phœnix Ins. Co. this Court held that the owners of a vessel cannot maintain in the admiralty a libel to limit their liability under the Limited Liability Act, when the damage which the vessel has inflicted was damage done upon land, as by setting fire to buildings by sparks from the vessel's smoke-stack. Thereafter, the owner of the vessel brought a bill in equity, which was heard by Mr. Justice Harlan and Judge Dyer, which bill prayed for a limitation of liability, and that persons prosecuting suits for recovery for damage alleged to have been inflicted upon the land by said vessel, he enjoined from the further prosecution of their suits. An injunction having been granted by the State Court, in which the bill in equity was brought, and the suit in equity having been removed to the Circuit Court of the United States, and heard before Mr. Justice Harlan and Judge Dyer, the injunction was in the Circuit Court of the United States dissolved. This case is Goodrich Trans. Co. *v.* Gagnon, and is reported in 36 Fed. Rep. 123. In this case, Mr. Justice Harlan says (p. 127), that the general words, "act, matter, or thing," etc., "must be restricted by the special words previously used in the same and is plainly ing sections." revised the purposes of that case, the decision called for was when ne point, whether those general words extended the con-
the meal.

struction of the special words, so as to make the provision of the Statute applicable to losses arising outside of the jurisdiction of the admiralty; and it was held that they did not so extend the construction, but must be limited in their meaning to the special words, which special words could not apply to matters outside of the jurisdiction of the admiralty.

The suggestion made by Judge Benedict (p. 382), that the sixth section of the Act indicates an intention to cover injuries other than those to property, because of the clause, "demands on account of any negligence of the master or crew," wholly ignores the fact that this is but taken from the earliest English Act; namely, that of 7 Geo. 2d, Ch. 15. Section 4 of that Act provides that nothing in that Act shall be construed to extend to "impeach, lessen, or discharge any remedy" which any person may have "against all, every, or any, the master and mariners of such ship or vessel, for or in respect of any embezzlement" of "any gold," etc., "or merchandise, shipped or loaded on board such ship or vessel, or on account of any fraud, abuse, or malversation of an in such master and mariners respectively; but that it shall and may be lawful to and for every person or persons so injured or damaged to pursue and take such remedy for the same, against the said master and mariners respectively, as he or they might have done before the making of this Act." This provision is copied word for word in the fifth section of the Act of 26 Geo. 3d.

The Massachusetts Act of 1818 provides, "that this Act shall not be construed to extend, to impeach, lessen, or discharge any remedy which any person or persons now hath, or may have, against all, every, or any, the master or mariners of such ship or vessel, for or in respect of any embezzlement, secreting or making way with any goods, wares, or merchandise, or other property, shipped or loaded on board such ship or vessel, or on account of any fraud, abuse, or malversation of and in such masters and mariners respectively; but such remedy shall remain in the same manner and to the same extents as if this Act had not passed." These phrases are much simplified in the Massachusetts Revised Statutes, Ch. 32, § 4. The Statute of 53 Geo. 3d, Ch. 159, provides in the fourth section thereof as follows: "Provided also and be it further enacted

that nothing herein contained shall lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner of his ship or vessel."

Thus it is seen that the Act of Congress of 1851, Ch. 43, § 6, and the United States Revised Statutes, § 4,287, are strictly taken from the Massachusetts law, itself taken from the English law, and in so far as the provision goes touching the master, etc., being an owner, from the English Act of 53 Geo. 3d. So much for the force of those words.

Then, as to Judge Benedict's ground of the Continental Codes. And first, we would ask, what are these codes? What is the evidence of them? What is their text, or rather, what are their various texts, and in what respects do they vary? What compensatory provisions do they, or may they, or may they not contain, or some of them at least, as qualifications or compensations for a provision which makes no discrimination between a bale of goods and a man? Do they all agree in that particular? And if they do, do some of them ameliorate the consequences of the strict letter of their law by some other provision by way of restitution, or some other form of qualification?

But Judge Benedict grounds his conclusions largely, and in view of his well-known fondness for a sweeping admiralty jurisdiction we say chiefly, upon these Continental Codes. Now, upon this matter we turn to the corner stone of the modern admiralty law of America,— the great case of the "Lottawanna," 21 Wall.,— a case which was decided upon great deliberation, and which even agitated the minds of members both of bench and bar, who waited with intense expectation and curiosity to know what the Supreme Court would do in its decision. Every phrase and line of doctrine therein laid down is, and for many years will remain, the charter of the admiralty law of this country. No expression contained in that great case can be regarded

as mere dictum. Says the Court in that case, and the decision is but a forcible illustration of the statement, says the Court, speaking through Mr. Justice Bradley (p. 576): "The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no State law or Act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as the law in the maritime usages of this country, and on such legislation as may have been competent to affect it.

To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian, and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own *legal history*, Constitution, legislation, usages, and adjudications as well. The decisions of this Court illustrative of these sources, and giving construction to the laws and Constitution, are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed. *But we must always remember that the Court cannot make the law, it can only declare it.* If, within its proper scope, any change is desired in its rules, other than those of procedure, *it must be made by the legislative department.* It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrollment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; *the limitations of the responsibility of ship owners for the negligence and misconduct of their captains and crews;* and many other things of a character truly maritime."

The decision of Judge Benedict was made in February, 1873;

that of the "Lottawanna" followed at the October term of the Supreme Court for the year 1874. It is unnecessary to say to the Court that among those eminent admiralty jurists of the bench of America, who have always taken advanced ground in the extension of the admiralty jurisprudence within this country, and have equalled or perhaps surpassed Judge Story in the desire to make it as broad as judicial authority can establish it, among whom certainly Judge Benedict is to be counted, there was probably no one more disappointed by the conclusion and grounds of the Court in the case of the "Lottawanna" than was Judge Benedict. But the clear lines drawn by the Court in that case, for the limits and for the proportions of our admiralty law, exclude and leave outside of them the maritime law of the continent, except in so far as that has been expressly adopted or incorporated into the usages of the country.

The widespread interest taken in the "Lottawanna" is testified to by the legal literature of the country shortly preceding and following that decision.

In the "Epsilon," Judge Benedict undertook to import the modern foreign codes into our system, in respects wherein they had by comparatively recent legislation extended the limitation of liability to loss of life. This undertaking the case of the "Lottawanna" has effectually set at rest. But Judge Benedict's fondness for these new legislations appears again in Thommassen *v.* Whitwill, 9 Ben. 409. In that case he does not, as before, rely upon new legislation regarding a matter not of adoption of old maritime law of the world (that founded in the Middle Ages), but upon the fact that in the matter of the release of the owner by abandonment of his vessel, the modern legislation of the continent has itself adopted the old and general maritime law of the world.

This is quite a different thing. However, Judge Blatchford, in the same case, on appeal (Thommassen *v.* Whitwill, 12 Fed. Rep. 891), places the decision on no such ground; but upon the ground further declared in the "Scotland" (105 U. S. 24), which had appeared pending the appeal, and which Judge Blatchford cites, that the rule to be applied is so applied, not as a rule of the maritime law as such, but as a rule of the Statutes of the United States.

And in the cases of the "City of Norwich," the "Scotland," the "Great Western," 118 U. S. 468, 507, 520 (the latter being the said case of Thommassen *v.* Whitwill), where this Act, limiting the liability of ship owners, came before this Court upon the question, among others, of the liability to answer for the insurance money, Mr. Justice Bradley, delivering the opinion of the Court, said (pp. 495, 496), that if the rule of the maritime law were different, the Statute must prevail; but, further, that it seemed that the weight of maritime authority was in accord with the construction given by the Court to the Statutes.

And Mr. Justice Matthews, delivering the dissenting opinion, concurred in by Justices Miller, Harlan, and Gray (p. 533), said, that "whatever bearing the foreign law may be thought to have upon the meaning of the Statute, it is clear that the latter must be interpreted in the light of the antecedent domestic law, which it modified and displaced."

In Thommassen *v.* Whitwill (the "Great Western"), Judge Benedict held that in a collision between an English steamer and a Norwegian vessel, in which the former was solely at fault, our Limited Liability Act did not apply; but that the general maritime law of the world applied; and that this had been expressly adopted in certain modern Continental Codes; and that under that general maritime law there must be an abandonment of the vessel; but that as the steamer had been sold since the collision, the power to abandon had been lost; and he therefore decreed against her for *full* damages.

Judge Blatchford in the Circuit Court reversed this decision, *on appeal*, and held that our Limited Liability Act applied, and limited the recovery to the value of the wreck. And the decree of the Circuit Court was affirmed in 118 U. S. 526.

The "Lottawanna," 21 Wall. 558, was an affirmance of the celebrated case of the "General Smith," 4 Wheaton, 438. The effort was made to overturn the decision in the "General Smith," but it was unavailing. Now, in the "St. Lawrence," 1 Black, 529, Chief Justice Taney, speaking of the case of the "General Smith," says: "It is obvious, from this decision, that the Court considered the process *in rem* or priority given for repairs or supplies to a domestic vessel by the Courts of Admiralty, in

those countries where the principles of the civil law have been adopted, *as forming no part of the general Maritime Code, but as local laws, and therefore furnishing no precedent for similar cases where the local law is otherwise; consequently they form no part of the admiralty and maritime jurisdiction conferred on the government of the United States.*"

But, even if the codes or other forms of the legislation of the continental nations of modern Europe could be judicially adopted by our Courts, as being a part of the actual legislation of our Congress upon general topics of the law maritime, it would be very dangerous to go to that extreme in matters concerning human life. The value of human life has always been much greater among the English and in this country than upon the Continent of Europe. It is a part of the genius of our institutions and of the sentiment of the American people to attach to human life a very high value, and it is very improbable that the Supreme Court, especially upon a subject removed from the power of the Legislatures and the Courts of the States, will ever import French, Italian, or other systems, to diminish that sacredness in which human life has ever been held among us.

Now what the Supreme Court, whenever it has applied the maritime law, has adopted, has invariably been what in the "Lottawanna" (p. 574), the Court denominates "*that venerable law of the sea*," and is not at all the checkered system or want of system as existing in detail in the different countries of Europe. This general maritime law, then, is not the differing codes law of the Europe of to-day, but is "the general system of maritime law, which was familiar to the lawyers and statesmen of the country when the Constitution was adopted"; and it is that, says the Court in the "Lottawanna" (p. 574), which "was most certainly intended and referred to when it was declared in that instrument (the Constitution) that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'" For, says the Court in this case, speaking of the want of uniformity in the varying codes of modern Europe, "it will be found, therefore, that the Maritime Codes of France, England, Sweden and other countries are not one and the same in every particular. . . . Each State adopts

the maritime law, not as a code having any independent or inherent force *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it" (p. 573).

Now this divergence between the modern codes of the different countries would seem to appear markedly in the matter of the limited liability of ship owners.

Ehrenberg (see *Am. Law Review*, Vol. 17, p. 5), in speaking of the diversity observable in the laws, not only of different countries, but in the system of a single nation, says it is only by separately detailing each case for the application of limited liability, and the special rule adopted, that it will be possible "to afford the reader a survey over the chaotic condition of the law now prevalent." And the writer in this Review says (pp. 19 and 20), "The example of England in recognizing the paramount importance of securing indemnity for injury to life and person is already making itself felt in other countries;" and he refers to Regnault as follows:—

Regnault in the *Revue Critique de Legislation* for 1876 (p. 550) uses the following vigorous language in advocacy of personal liability for loss of life (which for convenience we translate): "By abandoning his ship or the remnants, the owner is discharged. How now! What becomes then of the rights of the next of kin of the shipwrecked. Is it not indeed strange to say to the owner of a ship, 'You ought to pay; both law and morality oblige you to; and to add, you can, if you wish, pay nothing at all. Abandon your ship that is lost, that is no matter. The next of kin of the unfortunate victims may settle it as they can. You, the owner, you will lose nothing, and those having a right to indemnity have only the jetsam without value, or the ship sunk at the bottom of the sea.' Is such an answer serious? Is it moral? Is it honorable to say, 'I owe you,—that I acknowledge. Very well! I discharge myself in giving you nothing'?"

Turning now to the avowed purpose for which the Act was

passed by Congress, we look into the debates had upon that subject. The Court may refer to the journals and records of Congress, and to the history of the times, to determine the construction to be put upon a Federal Statute (Blake *v.* Nat. City Bank of New York, 23 Wall. 307. Simpson *v.* Story, 145 Mass. 498, and cases cited). The discussions upon this Limited Liability Act in the National Senate and House are contained in the twenty-third volume of the *Congressional Globe*, and for the Senate are on pp. 317, 331, 332, 479, 713 to 720. See also pp. 738 and 816. For the House, see pp. 24, 776, 777, 779. The bill originated in the Senate, and came from the Committee on Commerce, of which Mr. Hamlin, of Maine, was chairman. The discussion shows completly how entirely the purpose was to protect the carrying trade of America. No hint, no suspicion, no vague imagination even shown in the debate, of anything other than that. The record shows that all which lay in the minds of those who discussed the subject was the business of the carriage of goods.

And will the Courts now legislate?

The purpose was to place our commerce, so say the senators promoting the measure, on a footing with that of its great rival, England; and it is said throughout the debate that the bill is taken from the Statutes of England, and for that purpose.

Mr. Hamlin, who introduced the measure, said (p. 332), "I desire to call the attention of the Senate to a singular [?] point. This bill is predicated on what is now the English law, and it is deemed advisable by the Committee on Commerce that the American marine should stand at home and abroad as well as the English marine. Senators who may be disposed to look into the provisions of the English law will find in the ninth, sixteenth and thirtieth volumes of the English Statutes the very principle contained in this bill."

As to the matter of public policy, apart from the peril of exonerating fully insured owners from liability to their passengers, which would be contrary to public policy, there is no valid reason for applying the law when regarded as a matter of competition. England, which continues to have almost a monopoly of the steam navigation business of the world, and steam

navigation absorbs the passenger traffic, fixes the value of the vessel at the period of her sound condition, and merely sets a pecuniary limit, namely £8 and £15.

As the already settled American rule takes the value *after* the disaster instead of before the disaster, the position in which a passenger on an American vessel is placed is incomparably worse than that of a passenger on an English vessel, provided that our Limited Liability Act shall be construed to apply to the case of passengers. And with our being out of rivalry with England in this line of business, and indeed never having been in rivalry with her or with any other nation in this line of business, the extremest view is not broad enough to comprehend the application of the law to passengers, within the principle of public policy.

It is true that the Supreme Court has, in Norwich Co. *v.* Wright, 13 Wall., determined the time at which the value shall be taken as occurring differently from that which the English judges had adjudicated it, in construing a corresponding Statute in the English Statute books. Here, then, was a Statute law written upon the Statute book of England and also upon that of America. The judges of England, having to fix the matter of time, upon which the Statute is silent, fixed one time, while the Supreme Court of this country, the Statute being also silent (and there was no reference to that subject in the debate), fixed another. But nothing short of legislation could for either country, and especially for this country, where the history of the Acts is so perfectly preserved, extend the scope of the law beyond the carrying trade. Upon that subject there is no silence. The history of the Act, and the history *of the very words themselves of the Act*, throw an amount of light rarely to be found in seeking out the meaning of legislation, and all that is to be desired.

The statements that the bill passed by Congress was taken from the Statutes of England, and that it was copied chiefly from the Statute book of Massachusetts, are, as before shown, the same thing, as the Massachusetts law is but a copy of the English law, the form into which the latter law was simplified in the Revised Statutes of Massachusetts being the form which Congress chiefly adopted.

Now, we submit, it is clear that the words of this Act should not be given a construction which the framers never had in contemplation. If, as bare symbols, they are broad enough to cover losses suffered by the person, a life should not be breathed into them by the Court which they who put them together, or adopted them, never meant that they should be animated with. A testator or a Legislature may be presumed to have intended certain things from the language used, but no testator and no Legislature can be presumed to have intended what human foresight or ingenuity could not have anticipated. That steam was to be found a means of establishing travelling by sea on a large scale could not have been within the thought of those who enacted these Acts; and when the Legislature of Massachusetts copied the English Act word for word, and when Congress copied the Massachusetts Act word for word, with the Act of 1818 referred to in the margin of the Statute book, and when the framers of the Act of Congress looked into that Act of 1818 and the English Acts, with the scope and purpose of them all clearly defined in terms and reiterated in them, it is not to be supposed that they used those words and phrases (taken *verbatim et literatim*) with any other meaning than they always had had. "We must have regard to our own legal history," says the Court in the "Lottawanna." Any changes, other than those of procedure, "must be made by the legislative department," says the Court; and these fundamental views have now a peculiar force, if under the recent decision in Prov. and N. Y. Steamship Co. *v.* Hill Man. Co., 109 U. S. 578, the power to determine all such questions as these, being maritime, is lodged wholly in the tribunals of the Federal government (see *ex parte* Phœnix Ins. Co., 118 U. S. p. 625. Goodrich Trans. Co. *v.* Gagnon, 36 Fed. Rep. 123). No State Legislature can legislate, and if that case holds to the extent named, no State Court can adjudicate questions of this character. That the Federal Courts should be fastidiously careful that they do not legislate would seem to be very manifest. If Congress chooses to extend the force of the Limited Liability Act beyond the scope associated with its origin and its enactment, the people of the States of this country in their Courts and Legislatures may be helpless to prevent it. But, it would seem to be im-

probable that the Courts of the Federal government will do that which Congress would not undertake to do without much debate, or would not undertake to do all, or that those Courts will, upon such a question as this, lean in the direction of the work of legislation.

It has been argued by counsel for the Boston and Savannah Steamship Company, that if the Limited Liability Act be incomplete, the Courts must develop it. But the language of the Court in Providence and N. Y. S. S. Co. *v.* Hill Manufacturing Co., 109 U. S. 590, declares that the province of the Court is to give force to the Act by making provisions as to "*the form and modes of proceeding*"; and nowhere is there any intimation that the Court proposes to extend its power in the direction of developing the Act beyond its natural and obvious sphere, within the well settled rules of judicial construction.

But it is to be observed that this company was not merely a common carrier by water. In this case the company had contracted to carry also by land (Record, libel of Butler *et al.*, p. 3. Record, answer, petition, and exceptions of Butler *et al.*, p. 11). This contract for carriage was made at Boston (*ib.*), and the contract was to carry from Boston to Florida, and as far as Savannah as a passenger in this steamship, and the rest of the way by land (*ib.*).

Proceeding further as to what the Supreme Court has said upon the subject, that Court, in the case of Norwich Co. *v.* Wright, 13 Wall., give an account of the maritime law upon the subject of the limitation of the liability of ship owners; that is, of the *general* maritime law, as is said by Judge Strong in *in re* Norwich and N. Y. Transportation Co., 17 Blatch, 221. This enunciation of the general maritime law is by a reference to Judge Ware's opinion in the "Rebecca," and by citations from Grotius, the ancient French Ordonnance de la Marine of 1681, Valin and Pardessus. Then follows the historical account of the three English Statutes which were in force when the Act of 1851 was passed, and of the Statutes of Maine and Massachusetts (which historical account we have given with great fullness upon this brief). The Court then alludes to a change made in 1841 in the French law, enabling the ship owner, by abandonment, to obtain a complete discharge, thereby bringing

the law of France on the subject into accord with the general maritime law, and then proceeds to say: "In the light of all this previous legislation the Act of Congress was passed in 1851. As we have seen by the maritime law, the liability of the ship owner was limited to his interest in the ship and freight for all torts of the master and seamen, whether by collisions or anything else, and sometimes even for the master's contracts; and his liability was so strictly limited that he was discharged by giving up that interest, or by the vessel being lost on the voyage, and the maritime Courts found no difficulty in carrying this law into execution."

The question before the Court was *at what time* the value of the interest is to be taken. Upon that subject the Statute of 1851, which the Court was construing, was silent. The Court says (p. 120): "Here the owner's liability is limited to the amount or value of his interest in the vessel and freight, but the section does not define at what time that interest is to be taken." There is nothing in the case in the nature of legislation. The Court had to find some time, and the Statute was silent as to the time. Thus, the Court finds, that as the purpose of the Act was to enable the ship owner to be free from liability by "giving up that interest, or by the vessel being lost on the voyage," which purpose is that of the general maritime law of the world, the time must be that after the injury or destruction. The Court says finally: "In view of the fact that the limited liability of ship owners was, by the general maritime law, extended to all acts of the master, except contracts for the benefit of the ship, and in most places even to these, and of the fact that the English Statutes expressly extended it to cases of collision as well as to injuries to cargoes, we see no reason why the fair, natural construction should not be given to the Act of 1851, which makes an equally broad application of the rule, and there is nothing in the reason of the thing that should lead us to evade such a construction. The great object of the law was to encourage shipbuilding, and to induce capitalists to invest money in this branch of industry." See also,

Moore *v.* Am. Trans. Co., 24 How. 39.

See also,

Simpson *v.* Story, 145 Mass. 498, 499.

As that was the object of the law, which is so very manifest, how can it be said that Congress had in mind an entirely different class of enterprise; namely, that of transporting human beings,—a kind of business which has never attracted the notice of Congress for its protection? Indeed, so far from it, that Congress has, in legislating regarding passenger carriage by water, passed stringent Acts the better to preserve the security of passengers on steam vessels, see

U. S. Rev. Stat., §§ 4,424–4,426, *et seq.*, 4,463–4,500; Stat. 1882, Ch. 441.

See additionally,

U. S. Stat. 1882, Ch. 374, repealing §§ 4,252–4,277 of Rev. Stat., and providing substitution.

Hartranft *v.* Du Pont., 118 U. S. 226.

"The Strathairly," 124 U. S. 558.

"The Hazel Kirke," "The Rosa," 25 Fed. Rep. 601, 610.

"The Idaho," 29 Fed. Rep. 187.

"The Pope Catlin," 31 Fed. Rep. 408, 410, 411.

Oyster Police Steamers, 31 Fed. Rep. 763; 35 Fed. Rep. 926.

And it is not to be presumed that they meant this careful legislation to become a shadow, just in proportion as its provisions might be the most neglected, resulting in great destruction to life and property.

Mr. Justice Matthews, in Bowman *v.* Chicago, etc., R'y Co., 125 U. S., p. 484 (a case relating to the transportation of liquors by rail), says, merely incidentally, that in Ch. 6, Title 48, of the Revised Statutes, §§ 4,252–4,289, Congress had "legislated on the subject of the transportation of passengers and merchandise," "having reference, however, mainly to transportation in vessels by water"; but that §§ 4,278 and 4,279 "relate also to the transportation of nitro-glycerine and other similar explosive substances by land or water"; thereby including within the enumeration the limited liability sections. But the case called for no such enumeration,—the remark is merely incidental,—and the sections above mentioned of 4,252–4,277, we have already referred to on this brief as intended for the better protection of passengers.

The purpose of the Act of 1851 being as above shown, and the method of carrying it out being also as above shown to be in accordance with the general maritime law, let us examine how that purpose is provided for by the Statute.

The Revised Statutes of the United States provide (§ 4,284) as follows: "Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any *property* whatever, on the same voyage, and the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and [owner] [owners] of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any Court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."

Section 4,285: "It shall be deemed a sufficient compliance, on the part of such owner, with the requirements of this title relating to his liability for any embezzlement, loss, or destruction of any *property, goods, or merchandise*, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any Court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease."

So it is only in case of damage to "*property*" that any parties may take "appropriate proceedings in any Court" for the purpose of apportioning the sum for which the owner may be liable; and it is only in the case of destruction, etc., of "*property, goods, or merchandise*," that the owner of the vessel shall be allowed to make the transfer through a Court of Admiralty.

Is not this fairly conclusive upon the question? Thus it is certain that the libel of this company cannot be sustained as against these passengers; and it would seem to be very clear that if Congress had intended that the ship owner should plead the Act in bar of proceedings instituted against him by a passenger, the Act would have provided a means to enable him to take "appropriate proceedings" for an apportionment, and for

the surrender of his vessel as well, like as in the case of injury to goods or damage to property by collision. And see the language of Mr. Justice Harlan in Goodrich Trans. Co. *v.* Gagnon, 36 Fed. Rep., p. 127 (*supra*).

It would be a strange anomaly if the Act, upon a careful examination of the subject, should be so construed as to enable the vessel owner to abandon his vessel to persons who had lost property, but withhold from him the right to abandon to parties claiming for injuries to persons, and yet for the Court to apply the Act alike to both, and the only rational conclusion can be that the Act does not apply to injuries to persons, including therein, of course, loss of life. Norwich Co. *v.* Wright teaches the essential attribute of the Act of Congress to be that element which the Court declares to be an embodiment of the general maritime law, the element, that is, of *abandonment of the vessel.* It was that provision which was taken from no Statute, but from the general maritime law (Norwich Co. *v.* Wright, p. 127). It is that which particularly distinguishes the Act; and it is in the light of it, and of the ancient maritime law from which it is said to be borrowed, that all of the provisions of the Act are to be construed. But this essential feature of the Act is expressly limited to cases of damage to, or destruction of, property. If, then, the Court should hold that the Act is to be extended to the case of persons, what consequences and what anomaly would further ensue? If the essence of taking the value as after the accident is on account of the power of abandonment, instead of as before the accident, which latter the English Courts have held, and have held for the reason, as Norwich Co. *v.* Wright shows (see also "The Scotland," p. 28), that the English Act does not contain the provision for abandonment, then what is the consequence? Is it not that the value of the wreck, in the case of claims for damage to persons, requires to be appraised as of the time next preceding the disaster? while in the case of damage to property, that its value must be taken as after the disaster? That is the necessary conclusion. But, as the Act may be supposed to be symmetrical, and as it contains no provisions in conflict, does it not follow that its application is to the matters for which it provides; that is, that it is co-extensive with claims involving

damages to property, and only that. And see

Walker *v.* Boston Ins. Co., 14 Gray, 288.

The principles of Norwich Co. *v.* Wright would seem to practically dispose of this question when regarded from another point of view. The Supreme Court, in Norwich Co. *v.* Wright, refers to the general maritime law of the Middle Ages in giving a construction to the Act. The Act is in derogation of our law no further than its terms and its history reasonably warrant. Indeed, the familiar rule requires, in the case of a Statute, that the least departure from the earlier law shall be made which those terms necessitate.

If, however, light is shed upon the construction of the Act by other law, then it is the maritime law of the Middle Ages which aids that construction. How then can the Act be applied to the modern business of transportation of passengers, which has only become a distinct branch of business within a few years, and dates later than the application of steam to navigation?

Again, in "The Scotland," 105 U. S. 24, it is the general maritime law which it is stated is adopted in this country, not the special legislation of various continental nations, as embodied in their codes; and to show how entirely the Supreme Court has refrained from legislation, the Court says (p. 28), "But whilst this is the rule of the general maritime law of Europe, it was not received as law in England nor in this country until made so by Statute"; and then proceeds to say that the English Statutes have not yet adopted that law fully,—namely, in respect to enabling the owner to abandon the wreck, and to have the limit of his responsibility determined as of the time following the disaster.

And then the Court proceeds as follows: "But, whilst the rule adopted by Congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the Statute, *and not upon any inherent force of the maritime law.* As explained in 'The Lottawanna' (21 Wall. 558), the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country, and this particular rule of the maritime law had never been adopted in this country until

it was enacted by Statute. *Therefore, whilst it is now a part of our maritime law, it is nevertheless Statute law, and must be interpreted and administered as such.*"

This case arose directly under the Limited Liability Act.

And, further, that the limits of the admiralty jurisdiction are only to be ascertained by reference to what cases were cognizable in the maritime Courts when the Constitution was formed, see

"The Jefferson" (People's Ferry Co. *v.* Beers), 20 How. 401.

And further to the point that no State can enlarge the jurisdiction of the admiralty, and that no Act of Congress or rule of Court can make it broader than the judicial power may determine to be its true limits, see

"The St. Lawrence," 1 Black, 522.

In this case (1 Black, p. 527), Chief Justice Taney says: "This boundary (that of the admiralty jurisdiction) is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal government." So also

Ins. Co. *v.* Dunham, 11 Wall. 24, citing this.

Whenever the Supreme Court has applied the general maritime law to cases arising before them, will be observed that it they have limited themselves to that.

The growth of admiralty jurisprudence within this country has been in the direction of a freedom from the confined limits within which, owing to the well-known jealousy of the Courts of common law in England, the law of the admiralty was in that country restricted. But, while our admiralty law has expanded and developed, and this by the application of the general maritime law, our Supreme Court has carefully kept it

within the boundaries of the law and usages of this country, and has not imported the modern codes into our system.

It was at a very early day that the Supreme Court applied the rule of the general maritime law which gives a lien to a material man upon a foreign ship, and thus conformed to the law which had at an earlier day been recognized in England, but which, although since, in the year 1840 (3 and 4 Vict., Ch. 65, § 6), restored, had not been there conformed to since the reign of Charles II. See

"The General Smith," 4 Wheat. 438.
"The St. Jago de Cuba," 9 Wheat. 409.

See

Dissenting opinion of Daniel, J., in Ramsay *v.* Allegre, 12 Wheat. 614.

And it was at a yet earlier day that in respect to the Revenue and Navigation Acts, etc., the Supreme Court recognized the jurisdiction of the admiralty.

U. S. *v.* "The La Vengeance," 3 Dall. 297.
U. S. *v.* "The Sally," 2 Cranch. 406.
U. S. *v.* "The Betsey" and "Charlotte," 4 Cranch. 443.
"The Samuel," 1 Wheat. 9.
"The Octavia," 1 Wheat. 20.

As did they also in

"The Hope" (Hobart *v.* Drogan), 10 Pet. 108,

in the case of pilotage; and in

New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344,

in respect to contracts of affreightment. See also

Rich *v.* Lambert, 12 How. 347.

Then came the celebrated case of "The Genesee Chief," 12 How. 443. By that decision the admiralty jurisdiction was declared to extend to the navigable lakes and rivers of the United States, thus making that jurisdiction depend upon the navigable character of the water, and not upon the ebb and flow of the tide.

Then in 18 How. 267, Ward *v.* Peck, they upheld the admi-

ralty jurisdiction over petitory actions for vessels, and declined to follow the English law, as it had stood for ages till 3 and 4 Vict., Ch. 65, § 4.

Shortly thereafter, in Dupont *v.* Vance, 19 How. 162, the admiralty jurisdiction as to the obligation of the ship to the cargo in general average was established.

In none of these classes of cases are the modern codes of continental Europe relied upon, although the Court adopts the general maritime law, and rejects the narrow limitations of the English Courts upon the questions.

Then again, in the matter of pilotage, the Court refuses to follow the English rule, and adopts the principle that the vessel is liable, although compelled to take a pilot, for damages by collision with another vessel, even in case the fault were wholly with the pilot. The ground is that the responsibility of the vessel is not derived from the law of master and servant, or from the common law, but from the maritime law; and that the maritime law is the general maritime law which had its origin in the Middle Ages (p. 68).

"The China," 7 Wall. 53.

See also

"The Merrimack," 14 Wall. 199; Sherlock *v.* Alling, 93 U. S. 105–108.

Then "The Grapeshot," 9 Wall. 129, in respect further to maritime liens of material men, and which is said to explain the former decisions of the Supreme Court in Pratt *v.* Reed, and Thomas *v.* Osborn, but which we understand has generally been regarded as overruling those cases, adopted a more reasonable rule than it had been supposed that those cases provided; but the decision of the Court is based wholly upon the general maritime law (and see p. 138), and borrows nothing from the legislation of the continental nations of modern Europe.

Coming next to the broad application of the maritime law, so as to include within the admiralty jurisdiction suits upon policies of marine insurance, the Supreme Court, in Ins. Co. *v.* Dunham, 11 Wall. 1, redeclare that the admiralty jurisdiction of this country is not limited by the Statutes or judicial expositions of England, and they throw open the Courts of Admiralty to proceedings to enforce that species of contract; but there is

no reference whatever to these modern codes, and yet that decision involves, perhaps, the largest degree of expansion which any one case upon the subject of admiralty jurisdiction before that Court affords.

Nor does the statement that the Supreme Court has not gone beyond the general maritime law find any exception in respect to the nautical rules governing lights. The question in the case of "The Scotia," 14 Wall. 170, was (p. 187), "What was the law of the place where the collision occurred, and at the time when it occurred?" The place was the high seas. The question arose in a case of collision in which an American sailing vessel and a British steamer collided near mid-ocean. The American failed to show the lights provided for by Act of Congress, and did show a white light, which misled the English steamer, and caused her to take the other vessel for a steam vessel. It appeared that the same regulations as those provided for in the Act of Congress requiring a vessel to carry the red and green lights had "before the close of the year 1864" been adopted by "nearly all the commercial nations of the world," and that "they were recognized as having adopted them." Indeed that they had been adopted by "almost every commercial nation in existence"; that is, by over thirty commercial nations.

The Court held that thus the nautical rule as to lights had become, as it were, the common law of the sea. The Court treats the matter, not as one of municipal regulation when applied to a collision between vessels of different nationalities and upon the high seas, out of the jurisdiction of the municipal law of any country, but as a matter of *international* law; and they say (p. 188), "It is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require." And, further, they say, "This is not giving to the Statutes of any nation extra-territorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation." The principle thus adopted provides a rule of conduct for men of

all nationalities when traversing the domain common to them all, and is for the security of all.

But this attempt to shake off the old fetters has not in every case prevailed. So recently as at the October term, 1874, that Court refused, in Edwards *v.* Elliott, 21 Wall. 533, to recognize the existence of a maritime lien as arising from a contract to furnish materials for the building of a ship. Still, the enunciation of doctrine by the Supreme Court has been manifestly in the direction of liberating the jurisdiction of the admiralty in this country from the narrow bounds of the former jurisdiction thereof in England.

In "The Alabama" and "Game Cock," 92 U. S. 695, the Court refuses to follow the English law of the admiralty as declared in "The Milan," and establishes the rule for adjusting damages done to an innocent party between the parties in fault, as in the case of collision where there is mutual fault and a third party is injured thereby. See also "The Atlas," 93 U. S. 302; *ib.* 337; 97 U. S. 309; *ib.* 323; and later in "The North Star," 106 U. S. 17, the mode adopted of computing the damages in case of collision and mutual fault is the mode of the general maritime law (pp. 20 *et seq.*), and the English rule is not followed.

These will, we believe, be found to include the chief particulars in which the admiralty jurisprudence of the United States has been expanded and developed beyond what may have been from time to time regarded as its limits. We have undertaken to cite the decisions in which the departure, if it may be so called, has in each respect been taken, and under no one of the various heads have the modern codes been imported into our system of law. The Court has aimed to apply the general maritime law of the world, whenever it could do so without infringing upon the law and usages of this country; but beyond that it has in no case undertaken to go.

But if the Act limiting liability could otherwise be held to apply to loss of life or injury to passengers, the Act of Congress of 1871 (16 Stats. at Large, Ch. 100, p. 440), we submit, would take this case out of the operation of the Act. This is the same Act of 1871 as that passed upon in Carroll *v.* Staten Island R. R. Co. (*supra*).

Section 51 thereof (U. S. Rev. Stat. § 4,401), provides that "every coastwise, sea-going steam vessel, subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats."

This provision (as well as all the other provisions of this Act) does not restrict the common law liability, or diminish it (see cases *supra*).

The lost steamship was a coastwise, sea-going steam vessel, under enrollment, subject to all the laws and rules of navigation applicable to such vessels; and at the time of the loss was on a voyage from Boston to Savannah, and was wrecked in Vineyard Sound, upon the shore of Martha's Vineyard, Massachusetts, and when the catastrophe happened she was within the waters of Massachusetts, and was not upon the high seas (Record, libel of Butler *et al.*, p. 3; replication, p. 12; agreed facts, p. 14. Record, libel of Boston and S. S. S. Co., p. 4; answer, petition and exceptions, pp. 11, 15; agreed facts, pp. 19, 20).

Further, § 57 (U. S. Rev. Stat. § 5,344) provides that any "captain, engineer or pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence or inattention to his (or their respective) duties on such vessel, the life of any person shall be destroyed," shall be deemed guilty of manslaughter.

Section 43 (U. S. Rev. Stat. § 4,493) provides that "whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision or other cause, the master and owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured *to the full amount of damage*, if it happens through any neglect or failure to comply with the provisions of law herein prescribed, or through known defects or imperfections of the steaming apparatus, or of the hull," etc. The Revised Statutes read "provisions of this title."

Section 5,344 of the Revised Statutes is not under the same title (namely, title 52) as that of the other provisions mentioned, but in the Revision it is placed under title 70 (see U. S. *v.* Beacham, 29 Fed. Rep. 284, 285). But such change cannot alter the law as it stands in the text of the Statute of 1871.

Section 5,600 of the U. S. Revised Statutes provides as follows: "The arrangement and classification of the several sections of the Revision have been made for the purpose of a more convenient and orderly arrangement of the same, and, therefore, no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed." See also

"The Idaho," 29 Fed. Rep. 190.
Morrison *v.* Bernards Township, 35 Fed. Rep. 401, 402.

The sections of the Revised Statutes, 4,405 and 4,233, considered by Brown, J., of New York, in U. S. *v.* Miller, 26 Fed. Rep. 95–98, are legislations springing from different Statutes, and are not one piece of legislation springing from one and the same Statute.

Such "misconduct, negligence or inattention to his or their respective duties" is a "provision of this title." As there has been a failure to comply with the provisions of that title, the Act limiting liability would be (if otherwise applicable) to that extent modified, so that it could not be applied to the actions to recover for loss of life.

Haegi *v.* Prov. and N. Y. Steamship Co. (*supra*).
Chisholm *v.* Northern Trans. Co. (*supra*), p. 393, *et seq.*

The language of that Act is: "Whenever damage is sustained by any passenger, or his baggage, from explosion, fire, collision or other cause, the master and owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured, to the full amount of damage." It is *the full amount of damage*, not a partial amount, limited by any Act whatever.

But the disaster here was stranding, and that is not one of the particular causes named. To this we say: If the rule of *ejusdem generis* relied upon *supra* is not to be applied in the connection there invoked for it, that it has no more proper application to this Statute of 1871. It either does apply as a

rule of construction, or it does not. It cannot be ruled out for one Statute relating to sea-carriage, and ruled in for another Statute relating to sea-carriage.

If there was an omission in Vineyard Sound to have a pilot in charge, that would likewise be an infringement of the Act (Record, libel of Butler *et al.*, p. 4; agreed facts, p. 14; and replication, p. 12. Record, answer, petition, and exceptions of Butler *et al.*, pp. 12, 16; agreed facts, p. 19). But if the omission to have a pilot in charge did not come under the Act, yet such omission would be none the less fault or negligence at the common or by the maritime law.

One of the issues raised upon the agreed statement of facts (Record, libel of Boston and S. S. S. Co., pp. 19, 20. Record, libel of Butler *et al.*, p. 14) is, whether the ship was under the control and direction of a licensed pilot at the time of the disaster. And it there appears that the claim of the company is that the captain was in charge of the ship at that time, and not the second mate, who is claimed not to have been a pilot. And it further there appears that the ship was a coastwise, sea-going steam vessel, under enrollment, and on a voyage from Boston to Savannah, and proceeding through Vineyard Sound, stranded on Devil's Bridge, off and near Gay Head, Martha's Vineyard. Thus, that she was not proceeding on the high seas, but was proceeding within the waters of Massachusetts, so that a pilot should have been in charge under the Act of 1871. So proceeding, if she was not under the control and direction of a licensed pilot, there was an infringement of the Act of 1871.

Then, again, it is conceded that there was negligence on the part of those employed by the company in the grounding and wrecking, and that the steamship proceeded nearer the shore than was prudent or skillful (statement of agreed facts, Record, libel of Boston and S. S. S. Co., agreed facts, p. 19, agreeing to the allegations of the fourteenth article of the answer, petition, and exceptions, Record, pp. 11 and 12, which is the fourth article of the libel of Butler, administrator, *et al.*, Record, p. 3). If, as the company contend, the captain was in charge of the ship, the case falls equally within the provisions of the law, as is above set forth.

The effect of the Act of 1871 upon the Limited Liability Act does not appear to have been argued or considered in "The Gar-

den City," 26 Fed. Rep. 766, 776, although both Acts are in that case treated of.

It has been argued by counsel for the Boston and Savannah Steamship Company, that this legislation cannot be assumed to be any expression of legislative intention to modify the Limited Liability Act. The theory of his argument is, that Congress, in enacting the Limited Liability Act, understood and contemplated that such Act did cover damages for personal injury and loss of life. But this begs the question. The very proposition of the learned counsel that the legislation, culminating in the Act of 1871, is not to be assumed to be any expression of legislative intention to modify the Act of 1851 (the Limited Liability Act) of itself leads to a fair inference that Congress did not understand the Limited Liability Act to apply to loss of life or personal injury. And a comparison of these legislations in Carroll *v.* Staten Island R. R. Co., *supra* (see also Chisholm *v.* Northern Trans. Co., pp. 393, 394, *supra*), leads to this identical result. And the careful legislation by Congress for the protection of passengers (already referred to on this brief with the Statute citations) suggests that Congress did not contemplate that the same should become a shadow in proportion as its provisions might be most neglected.

II.

If the Court should decide that the Limitation of Liability Act applies to these cases of loss of life or personal injury, the next question would be whether an order should be made to bring the insurance money into Court. The steamship company has answered that "The City of Columbus," together with another steamer, both the property of the company, were mortgaged to the Ocean Steamship Company of Savannah; and it appears from the answer that the mortgagee was by indorsement made the payee of the policies (Record, answer to motion of Butler *et al.*, pp. 21–23). There is nothing in the answer to show that the mortgage has been recorded under U. S. Revised Statutes, § 4,192, so as to operate upon parties without actual notice; and there is nothing to show that the mortgagee was insured under the policies (*ib.*). The answer sets forth that Mr. Nickerson was the agent who insured for whom it concerned, and that he was also the payee named in the body of the poli-

cies (*ib.*). It was the mortgagor which was to be the assured; and the covenant in the mortgage was that the mortgagor should assign and deliver the policies, having first obtained the assent of the insurance companies (*ib.*). If, as the answer leaves the matter, the indorsement by which the mortgagee became the payee of the policies could be treated as an assignment, and not merely as a mere order to pay to the mortgagee, it could not operate as an assignment of the right to the insurance money without an assent of the company to the assignment. And, moreover, the policies may be presumed to contain the usual clause providing for an assent by the insurer in case of an assignment of the policy; and, in any case, without that assent there can be no assignment binding on the company. But, with or without assent, the insurance is still the insurance of the mortgagor, and on his property and for his account.

Carpenter *v.* Providence Ins. Co., 16 Pet. 502, 495.
Phillips *v.* Merrimack Ins. Co., 10 Cush. 350, 353.
Fogg *v.* Middlesex Ins. Co., 10 Cush. 345.
Minturn *v.* Manufacturers' Ins. Co., 10 Gray, 501.
Palmer *v.* Merrill, 6 Cush. 282, 286.
Loring *v.* Man. Ins. Co., 8 Gray, 28, 29, 30.
Bowditch Ins. Co. *v.* Winslow, 8 Gray, 38.
Tate *v.* Citizens' Ins. Co., 13 Gray, 79.
1 Parsons, Mar. Ins. 53; 2 *ib.* 460.

Even if there were such assent, the indorsement leaves the matter a mere order to pay, and constitutes the mortgagee merely a payee.

Carpenter *v.* Prov. Ins. Co. (*supra*).
Bates *v.* Eq. Ins. Co., 10 Wall. 33.
Bates *v.* Eq. Ins. Co., 3 Cliff. 215, 220.
Hale *v.* Mechanics' Ins. Co., 6 Gray, 172.
Smith *v.* Union Ins. Co., 120 Mass. 90, 91.
Fogg *v.* Middlesex Ins. Co., 10 Cush. 346.
Young *v.* Eagle Ins. Co., 14 Gray, 153.
Barrett *v.* Union Ins. Co., 7 Cush. 175.
Papke *v.* Resolute Ins. Co., 17 Wis. 382.

And after such indorsement by Mr. Nickerson, the Boston and

Savannah Steamship Company could have maintained a suit in their own names.

Somes *v.* Equitable Ins. Co., 12 Gray, 531.
Rider *v.* Ocean Ins. Co., 20 Pick. 259.
Martin *v.* Franklin Ins. Co., 1 Law and Eq. Reporter, 82.

The Ocean Steamship Company is, therefore, a mere payee; and if the insurance money has been by the several insurance companies paid to that company, that company holds the insurance money as a mere trustee for whomever the money may really belong to. The fact that the money, according to the answer, is in the hands of a company out of the jurisdiction of the Court, is not material, as the answer shows that that company has, as mortgagee, a large interest in the other steamer, "The Gate City" (Record, answer to motion of Butler *et al.*, pp. 21–23), which is running regularly between Boston, within this jurisdiction, and Savannah (Record, exceptions to said answer, p. 24); and a proper order can be framed by the Court under which to enforce any order the Court may make concerning the bringing in the insurance money. But, if the mortgagee were to be regarded as an assignee of the policies, or even, further, if he were to be regarded even as the real assured, the question is still left as though the money had been paid to the Boston and Savannah Steamship Company, for their own use and benefit.

The contract of the passenger for safe transportation to his destination carries with it a lien upon the vessel for damages; and he may also sue *in rem* to recover back his passage money; and there is no doubt that damage to the passenger establishes likewise a lien upon the vessel, based upon the tort.

"The City of Brussels," 6 Ben. 370.
"The Pacific," 1 Blatch. C. C. 569.
"The Aberfoyle," 1 Blatch. C. C. 360.
"The Zenobia." Abbott's Adm. 48.
Walsh *v.* "The M. H. Wright," 1 Newb. Adm. 494.
"The steamboat New World," 16 How. 469.

This lien, as is the case with all maritime liens, is superior to any lien by way of mortgage.

"The Guiding Star," 18 Fed. Rep. 263–269, by Mr. Justice Matthews (s. c. 9 Fed. Rep. 521).

"The J. W. Tucker," 20 Fed. Rep. 134.
"The Arctic," 22 Fed. Rep. 128.
"The Wyoming," "The Dacotah," 35 Fed. Rep. 548.
"The Amos D. Carver," 35 Fed. Rep. 665.
"The Gen. Burnside," 3 Fed. Rep. 228.
"The Charlotte Vanderbilt," 19 Fed. Rep. 219.
"The Sarah J. Weed," 2 Lowell, 562.

An exception to this rule has, in certain districts and circuits, been declared in the case of liens upon domestic vessels, accruing subsequently to a mortgage, duly recorded.

"The De Smet," 10 Fed. Rep. 483 (5th circuit).
"The Josephine Spangler," 9 Fed. Rep. 773 (5th circuit).
Miller *v.* Proceeds of "The Kate Hinchman."
Chicago Leg. News, Aug. 26, 1876, p. 338.

But this has been accepted with reluctance by Judge Pardee.

"The De Smet" (*supra*), p. 487.

And, as Judge Pardee says, it is unsound ("The De Smet," *supra*);

"The Island City," 1 Lowell, 375.
"The Rapid Transit," 11 Fed. Rep. 331.

And the cases just above.

As the lien of these passengers is superior to that of the mortgagee, if the vessel had been saved they could have entertained their suits *in rem* to the full value of the vessel, regardless of the mortgagee's share of that value. If the two steamships mortgaged were of nearly equal value the mortgagee has had his debt, as referable to this vessel, more than paid. As the mortgage was subordinate to the passengers' liens, the case would stand, even if the mortgagee could be regarded as the assured, as though the insurance money had been due to and wholly owned by the Boston and Savannah Steamship Company. The question then would be, if the Limitation of Liability Act be held to apply, whether an order should be made to bring this money into Court.

The cases where the subject of bringing the insurance money

in as a substitute for the wreck have been considered, are cases of claims for damage to cargo,

"The City of Norwich," 118 U. S. 468;

or for damage to another vessel,

"The Scotland," 118 U. S. 507.

"The Great Western," 118 U. S. 520.

A cargo owner, or the owner of the other vessel, can insure his cargo or his vessel quite as well as the vessel owner who claims a limitation of liability can insure his vessel; and there would seem to be a less equity, if any equity, in admitting the loser of cargo or vessel to participate in the insurance money. Not so with the life or limb of the passenger. The cargo owner or vessel owner is by his insurance placed *in statu quo*. He, if insured, suffers nothing by the loss of his goods or vessel, but an insurance upon life does not place the life insured *in statu quo*, nor does payment under an accident policy compensate most men for a serious injury; and Mr. Justice Bradley makes this plain in delivering the opinion of the Court in "The City of Norwich," 118 U. S. p. 495. He says, touching the matter of bringing the insurance money into Court: "If the ship owner is indemnified against loss, it is because he has seen fit to provide himself with insurance. The parties suffering loss from the collision could, if they chose, protect themselves in the same way; in fact, they generally do so. And when they do, it becomes a question between their insurers and the ship owner whether they or he shall have the benefit of his insurance. His insurers have to pay his loss. Why should not the insurers of the other parties pay their loss?"

The Statute provides (U. S. Rev. Stat. § 4,283) that the liability of the owner of the vessel "shall in no case exceed the *amount* or *value* of the interest of such owner" in the vessel and freight. That value and that amount are not lost to the assured in this case. The insurance makes the owner whole or nearly so. He has merely lost that thing which has become "a mere congeries of planks" (2 Parsons on Mar. Ins. 120), but the amount or value of his interest is preserved to him.

We do not point to the language of the Statute as to a mere form of words, but as expressing that equity which we should

ask the Court to find if the language of the Legislature had been different; and the admiralty is a broad equity.

2 Pars. Ship. and Adm., 344, *et seq.*

In the foregoing cases of "The City of Norwich," "The Scotland," and "The Great Western," it was the opinion of Justices Miller, Harlan, Matthews, and Gray, as expressed by Mr. Justice Matthews in the dissenting opinion (118 U. S. 526–541), that there is a liability to answer for the insurance money; and there the question was as between the owners of cargo and a third party's vessel, on the one side, and the assured on the other.

III.

A Statute of the State of Massachusetts, providing for recovery in the case of loss of life, is relied on. That law, as contained in the Public Statutes of Massachusetts, Ch. 73, § 6, is, and at the time of the disaster was, as follows: "If the life of a passenger is lost by reason of the negligence or carlessness of the proprietor or proprietors of a steamboat or stage-coach, or of common carriers of passengers, or by the unfitness or gross negligence or carlessness of their servants or agents, such proprietor or proprietors and common carriers shall be liable in damages not exceeding five thousand nor less than five hundred dollars, to be assessed with reference to the degree of culpability of the proprietor or proprietors or common carriers liable, or of their servants or agents, and recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the widow and children of the deceased, in equal moieties; or, if there are no children, to the use of the widow; or, if no widow, to the use of the next of kin.

The tort here complained of is a marine tort, and, therefore, cognizable by a Court of Admiralty. So also is the breach of contract between the carrier and the passenger the breach of a maritime contract.

Chamberlain *v.* Chandler, 3 Mason, 242.

"The City of Brussels," 6 Ben. 370.

Sherlock *v.* Alling, 93 U. S. 101, 102, 108, and cases *supra.*

Upon either basis, therefore, the Statute providing for recovery can be relied on and enforced.

Courts of Admiralty enforce other Statutes in respect to matters which are maritime, and as such come within the admiralty jurisdiction; and no reason is perceived why Statutes of the kind here relied upon should not likewise be enforced by those Courts.

Familiar illustrations of this are the cases of State Statutes in favor of material men, and for pilotage ("The Lottawanna," 21 Wall. 558; "The America," 1 Lowell, 176; "The California," 1 Sawyer, 463; "The Gleneame," 7 Fed. Rep. 604), and for tolls ("The St. Joseph," 10 Chic. Leg. News, 269. See also "The Shady Side," "The Morrisania," 23 Fed. Rep. 732, 731; Woodruff *v.* One Covered Scow, 30 Fed. Rep. 269; "The Craigendoran," 31 Fed. Rep. 87; "The Sylvan Stream," 35 Fed. Rep. 315); and Statutes of the United States for tonnage dues ("The George T. Kemp," 2 Lowell, 485); and the case of the common law lien of a shipwright ("The B. F. Woolsey," 7 Fed. Rep. 108, 116–119; "The Marion," 1 Story, 68; "The Julia L. Sherwood," 14 Fed. Rep. 590; "The Two Marys," 10 Fed. Rep. 925, 16 Fed. Rep. 697), which arises outside of the admiralty law as much so as does a right or a remedy conferred by a Statute, also comes within the province of a Court of Admiralty to enforce.

But whatever may be regarded as the law touching the operation of State Statutes providing for recovery for loss of life, when the disaster from which the death results occurs out of the jurisdiction of the Court, or where the defendant is not an inhabitant of the State which enacted the Statute, the only question which arises here is, as to the application of a Massachusetts Statute to an inhabitant of that State, and in respect to a disaster which occurred within the limits of that State. The Boston and Savannah Steamship Company is a Massachusetts corporation, and the disaster was within the limits of that State, and that fact is averred by this company in the tenth article of their libel, and the contract for carriage was made at Boston, Mass. (Record, libel of Butler *et al.*, p. 3. Record, libel of Boston and S. S. S. Co., agreed facts, p. 19, clause 1). And the place of departure was said Boston (Record, libel of Butler *et al.*, pp. 2 and 3. Record, libel of Boston and S. S. S. Co., agreed facts, p. 19, clause 1).

In *ex parte* McNeil, 13 Wall. 243, in which a State Statute for pilotage was decided to be enforceable in the admiralty, the question went up on a petition for a writ of prohibition. The Court said (p. 243), "It is urged that a State law could not give jurisdiction to the District Court. That is true. A State law cannot give jurisdiction to any Federal Court; but that is not a question in this case. A State law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal, whether it be a Court of equity, or admiralty, or of common law." And they said that, as to the principle herein involved, "In no class of cases has the application of this principle been sustained by this Court more frequently than in those of admiralty and maritime jurisdiction." See also

Reynolds *v.* Crawfordsville Bank, 112 U. S. 410.
Broderick's Will, 21 Wall. 519, 520.
Holland *v.* Challen, 110 U. S. 18, 24.

In Holmes *v.* O. and C. R'y Co., 5 Fed. Rep. 75, Judge Deady enforced a Statute of the State of Oregon, giving a right of action to an administrator to recover damages for the death of the intestate. The disaster occurred within the State of Oregon. The Court held that the State Statute is enforceable in admiralty.

In "The Highland Light," Chase, 150, the action was for the death of an employé. But the Court maintained that a Statute of the State of Maryland giving damages for death by negligence could be enforced, and held that an action *in personam* would lie against the owners.

In "The Garland," 5 Fed. Rep. 924, the Court (Brown, J., of Michigan) sustained the jurisdiction under a State Statute of Michigan, giving damages for loss of life. The disaster occurred within the State of Michigan. This case ("The Garland") is also reported in 20 Am. Law Reg. (N. S.) 742; and in a note thereto (p. 745) the matter is discussed. In conclusion, the writer of the note says: "This examination of the cases seems to warrant the following statement of the law: The wrongful killing of a human being is a tort within the jurisdic-

tion of the State governments. Statutes passed by them, giving to the administrator or executor of the deceased a right of action for such tort, are applicable when the killing takes place upon navigable waters within the territorial limits of the States respectively. On the principle that, as to matters within the jurisdiction of a State, its laws, unless superseded by Federal Statutes, follow and are in force upon vessels of the State upon the high seas, such Statutes also give the executor or administrator a right of action when the killing takes place upon the high seas. The tort being maritime, the right of action will be enforced in a Court of Admiralty of the United States, whenever the killing is upon navigable water."

This doctrine of the extra-territorial force of a State Statute over a ship on the high seas is by Judge Pardee, in "The E. B. Ward," 17 Fed. Rep. 457, applied when the ship belonged to the State in which the Statute was passed (s. c. 23 Fed. Rep. 900). The Statute was that of Louisiana, giving damages for loss of life. This case overruled the decision of the same case reported in 16 Fed. Rep. 255.

But in Armstrong *v.* Beadle, 5. Sawyer, 484, which was an action at common law, the Court refused to give to a State Statute, giving a right of action for death by negligence, an extra-territorial force, as the death occurred on the high seas.

A State Statute for the loss of life of a person upon a steamboat was enforced in admiralty by Judge Choate, in *In re* Long Island, etc., Trans. Co., 5 Fed. Rep. 599; and by Judge Benedict in Hrebrik *v.* Carr, 29 Fed. Rep. 298. The Statute was in each case a New York Statute, and the place where the disaster occurred was, at least in *In re* Long Island, etc., Trans. Co., within the State of New York. See also

Ladd *v.* Foster, 31 Fed. Rep. 827.
Holland *v.* Brown, 35 Fed. Rep. 43.

In "The E. B. Ward" (*supra*), Judge Pardee says that "The Sylvan Glen," 9 Fed. Rep. 335, stands alone among the admiralty authorities as taking a contrary view to the proposition that admiralty will enforce a proceeding *in rem* when the tort was committed within the State which enacted the Statute. See

"The Manhasset," 18 Fed. Rep. 918.

See

Oleson *v.* "The Ida Campbell," 34 Fed. Rep. 432.

In Sherlock *v.* Alling, 93 U. S. 99, which was an action originally brought in the State Court of Indiana, and apparently removed to the Circuit Court of the United States, the facts were that a collision occurred upon the Ohio River, whereby a passenger lost his life. The action was brought by his administrator to recover therefor, under a Statute of the State of Indiana. It was within the limits of that State that the disaster occurred. One ground of defence was that the State Statute infringed upon the province of the Federal government, as the matter complained of was a marine tort, and could not therefore be enforced.

The Court refers to Steamboat Co. *v.* Chase, 16 Wall., and holds that the action may be maintained, see

Prov. and Ston. S. S. Co. *v.* Clare admx. (*supra*).
Dennick *v.* R. R. Co., 103 U. S. 11.

Steamboat Co. *v.* Chase, 16 Wall. 522, was upon a writ of error to the Supreme Court of Rhode Island. The action was brought by the administrator to recover for loss of life caused by a collision upon Narragansett Bay, within the State of Rhode Island. The action was brought upon a Statute of the State of Rhode Island giving damages for loss of life. The Court sustained the action. See also

Buford *v.* Halley, 28 Fed. Rep. 680.
Lorman *v.* Clarke, 2 McLean, 568.
Robostelli *v.* New York, etc., R. R. Co., 34 Fed. Rep. 719.

Ex parte Gordon, 104 U. S. 515, was a petition for a writ of prohibition, to restrain the District Court for Maryland in admiralty from proceeding further in a cause begun in that Court against his vessel, to recover damages for the drowning of certain persons in consequence of a collision. The Supreme Court denied the petition.

The Chief Justice who delivered the opinion of the Court said (p. 517): "Suppose the Courts of common law had never de-

cided that an action could not be maintained at common law for damages caused by the death of a human being, would any one doubt the power of Courts of Admiralty to determine whether such an action could be brought in that jurisdiction? It is no doubt true that down to within a comparatively recent period the Courts of Admiralty, both in England and this country, have followed the rule of the common law in respect to such actions, and have decided that damages for such wrongs were not recoverable; but since Lord Campbell's Act in 1846 (9 and 10 Vict., Ch. 93) it has been provided by Statute in England, and in most of the States of the Union, that suits may be brought in the Courts of common law, for the benefit of those having a pecuniary interest in the life of one who has been killed by the wrongful act of another, to recover such damages as they may have sustained in consequence of the wrong that has been done; and we think it is clearly within the power of the Courts of Admiralty to determine whether this legislation has not wrought a corresponding change in the laws which govern their jurisdiction." The Court, therefore, declined to grant the writ of prohibition.

But since the decision of this Court in "The Harrisburg," 119 U. S. 199, it would seem that damages for loss of life cannot be recovered under the general maritime law independently of a Statutory provision.

The thirteenth article of the libel of Butler *et al.* (Record, p. 6), and the twenty-third article of the answer, petition, and exceptions of Butler *et al.* (Record, p. 14), aver that the deceased suffered great mental and bodily pain and misery; for which in both of the said pleadings, damages are claimed (Record, pp. 6 and 16). The proceeding in the cases at bar is *not* wholly for loss of life.

The Supreme Court of New Hampshire, in a recent case (decided in March, 1888), has held that in death by drowning, an inference may always be drawn that the deceased suffered pain both mental and physical, even if there be not any evidence of the circumstances surrounding the death, and especially if the water was stagnant, muddy or slimy.

Clark *v.* "City of Manchester," 13 Atlantic Reporter, 869.

IV.

The decree dismissing the petition and answer of Butler, administrator, *et al.*, is a final decree (Record, libel of Boston and S. S. S. Co., p. 26). It denies to them the right to maintain their claim.

If this Honorable Court should hold that we are correct in our proposition that the Limited Liability Act has no application to our case, but yet that we are confined to the form of a petition under the company's libel in which to prosecute our claim, it would be monstrous to hold that we are tied to any security given for the value of the wreck in the District Court, or that our independent cause of action is impeded by connection with other and independent claims of third parties. The decree is a decree dismissing the petition, and can be nothing less or other than a final decree. To the point that the decree under the company's libel is a final decree, see

Gumbel *v.* Pitkin, 113 U. S. 547, 548, 546, 545.

See, further,

Davies *v.* Corbin, 112 U. S. 36.

And so, when separate creditors unite in a suit in equity, each claiming his proportionate share of the property of the common debtor in the respondents' hands, the final decree for the complainants is a final decree in favor of each, and not of all, so that the Supreme Court has not jurisdiction on appeal, as based on the aggregate amount exceeding $5,000. Fourth Nat. Bank *v.* Stout, 113 U. S. 684, Chief Justice Waite says (p. 686), "The appellees have separate and distinct decrees in their favor depending on separate and distinct claims." See also

Davis *v.* "The Seneca," Gilpin, 38.
Same case, but on other points, 3 Wall., Jr., 395.
Wescott *v.* Bradford, 4 Wash. 492.
Forgay *v.* Conrad, 6 How. 201, 203, *et seq.*
French *v.* Shoemaker, 12 Wall. 86, 98.
Bronson *v.* Railroad Co., 2 Black. 531.
Blossom *v.* Railroad Co., 1 Wall. 657.

Stewart *v.* Dunham, 115 U. S. 61.
Henderson *v.* Wadsworth, 115 U. S. 276.
Hassell *v.* Wilcox, 115 U. S. 598.
Benjamin's Heirs *v.* Dubois, 118 U. S. 48.
Dainese *v.* Kendall, 119 U. S. 54.
Gibson *v.* Shufeldt, 122 U. S. 27.
Ex parte Phœnix Ins. Co., 117 U. S. 369.

Even as to joint parties, see Thomas *v.* Lane, 2 Sumner 1, which is *not* inconsistent with U. S. *v.* Girault, 11 How. 22. The following cases do *not* invalidate the foregoing conclusions:

"The steamboat New England," 3 Sumner, 495.
Modecai *v.* Lindsay, 19 How. 199.
Montgomery *v.* Anderson, 21 How. 386.
Crosby *v.* Buchanan, 23 Wall. 420.
Norton *v.* Hood, 12 Fed. Rep. 763.
Gibson *v.* Shufeldt, 122 U. S. p. 32.

And there is *no* analogy between parties in these proceedings and salvors.

But if the decree of the District Court were not final, which, under the Judiciary Act of 1789 (U. S. Rev. Stat. § 631), would be necessary to an appeal to the Circuit Court, the case under the petition and answer would be rightly brought to the Circuit Court under the Statute of 1872 (U. S. Rev. Stat. § 636). This Statute applies to admiralty proceedings.

"The Benefactor," 103 U. S. 248.

The jurisdiction of the Circuit Court, under this Statute, is to "affirm, modify, or reverse" "any judgment" "or order of a District Court," as well as "any decree"; whereas, under the Judiciary Act of 1789 (U. S. Rev. Stat. § 631) the jurisdiction of the Circuit Court is limited to appeals from "final decrees of a District Court." And the Statute of 1872 further confers upon the Circuit Court the power to "direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the District Court, as the justice of the case may require."

In "The Elmira," 16 Fed. Rep. 133, Mr. Justice Matthews

decided that there was no remedy by appeal to the Circuit Court from the District Court upon a motion that an execution be quashed, where the decree upon which the execution issued was a final decree, and no appeal had been taken therefrom. He cites this Statute, as well as the earlier Statute of 1789 (p. 134), and he seems to regard the matter before him as involving the question whether the order appealed from was a final decree; but he declares (p. 140) that the final decree upon which the execution issued contained the fault complained of, if any fault there were; and that any order he might make would be nugatory, as that decree remained unappealed from, and as long as that decree should remain in force.

In United States *v.* Abatoir Place, 106 U. S. 160, cited by Mr. Justice Matthews, as United States *v.* Frerichs, 1 Supreme Court Reporter, 169, this Statute of 1872 does not seem to have been noticed; and the decision in that case is based upon a list of decisions made before the year 1872, which list Mr. Justice Matthews cites and refers to at length. And in that case, as in "The Elmira," the order appealed from was upon a matter subsidiary and subsequent to a final judgment rendered.

And so in Norton *v.* Hood, 12 Fed. Rep. 763, § 636 seems to have escaped notice; and the decision is based upon § 631. See further,

Ten Cases (Guiet claimant) *v.* U. S. 34 Fed. Rep. 100.

If the Act limiting liability be held not to apply to this case, the question as to the insurance money does not come to be considered in any form; so that any purpose there might otherwise be in enforcing the claim for damages in the petition under the company's libel ceases.

And, of course, if the Limited Liability Act does apply, no independent libel can lie, because the company has instituted proceedings in a Court of Admiralty to limit its liability, and has obtained a restraining order.

In the recent cases of "The Scotland" and "The Great Western" (118 U. S. 507 and 520), there was no libel filed to limit

liability and petitioning for an order restraining suits. But, in "The City of Norwich," associated with those cases (118 U. S. 468), there was such a libel filed and such a restraining order passed; and the appellants (those interested against the libellants by a libel seeking a limitation) appeared in that proceeding, although they had, before the filing of the libel to limit liability, obtained a decree in the District Court on an independent libel; and they were restrained (pp. 472–475, and brief of counsel on p. 475).

In Prov. and N. Y. S. S. Co. *v.* Hill Mfg. Co., 109 U. S., the Court says (p. 594): "After proceedings have been commenced in the proper District Court," in pursuance of the Limited Liability Act, "the prosecution *pari passu* of distinct suits in different Courts, or even in the same Court, by separate claimants, against the ship owners, is, and must necessarily be, utterly repugnant to such proceedings, and subversive of their object and purpose."

We submit that for the purpose of maintaining an action there is nothing contained in the case of Prov. and N. Y. S. S. Co. *v.* Hill Mfg. Co., 109 U. S. 578, which requires the procedure to be under the company's libel, provided that the Limited Liability Act has *no* application. Objections to requiring the procedure to be under the company's libel in any such view of the law are, among others, the suggestion whether a party, seeking recovery thereunder, could have an execution for his damages, and the manifest inability to proceed by attachment on mesne process. The procedure by attachment is sufficient to confer jurisdiction in the admiralty, when the respondent is beyond the jurisdiction of the Court.

Atkins *v.* Disintegrating Co., 18 Wall. 272.
New England Ins. Co. *v.* Detroit, etc., Co. (*ib.*) 307.

And it is a right, apart from its jurisdictional value, of which a party should not be deprived, whether the respondent be within or without the jurisdiction.

Before the question was settled as above, by the Supreme Court, a rule passed by Judge Sprague in 1855, established the right of attachment upon mesne process in the admiralty for the District Court of Massachusetts.

2 Pars. Ship. and Adm. 763, Appendix.
Louisiana Ins. Co. *v.* Nickerson, 2 Lowell, 310.

In Briggs *v.* Day (*supra*), 21 Fed. Rep. 727, the stipulation given by the company was in excess of the amount recovered by the party, who alone had claimed damages, although the amount claimed exceeded the stipulation.

If the foregoing proposition, that the decree under the company's libel is a final decree, were untenable, there would be additional force in the ground that, provided the Limited Liability Act does not apply to this case, the remedy for damages is under the independent libel. For, if not a final decree, it might follow that an appeal would not lie to the Supreme Court of the United States from the Circuit Court until the claims of any number of persons independently seeking damages had been adjudicated in the District Court under the company's libel. This would not seem to be a correct method, because, in addition to the reasons above given, they would not be litigating with reference to the fund in Court especially, but would chiefly be seeking to enforce the liability of the company for damages, without, however, necessarily waiving a right to look to that fund as to any other property of the company out of which to satisfy their debt.

V.

Under the new rule of the Supreme Court of the United States (Rule 58, 103 U. S. XIII.), all the rules and regulations for limiting liability shall apply to the Circuit Courts, where the cases are, or shall be, pending in those Courts upon appeal from the District Courts.

"The Benefactor," 103 U. S. 248, 249.

If this Court shall hold that the Act limiting liability does apply to the case of these parties, then the question as to the payment in of the insurance money arises.

Had these petitioners proved their claim with reference to the small fund in the District Court, they would be in no better position for claiming their share of the large fund, which the insurance money when paid into Court will constitute. The

District and Circuit Courts have refused to order that larger fund to be paid into Court. These petitioners now seek to have that decree reversed, if the Limited Liability Act applies to their cause of action; and ask, in that event, that the insurance money be paid into Court, and, of course, that they be allowed to share therein.

FRANK GOODWIN,
EUGENE P. CARVER,
For John Haskell Butler, Admr., et al.

Supreme Court of the United States.

Nos. 244 and 340.

THE "CITY OF COLUMBUS."

JOHN HASKELL BUTLER, ADM'R, ET ALS.,
APPELLANTS,

v.

BOSTON & SAVANNAH STEAMSHIP COMPANY,
APPELLEE.

SAME *v.* SAME.

BRIEF FOR APPELLEE.

CHARLES THEODORE RUSSELL, JR.,
Proctor for Appellee.

BOSTON:
NATHAN SAWYER & SON, PRINTERS.
1889.

Supreme Court of the United States.

JOHN HASKELL BUTLER, ADMINISTRATOR, ET AL.,

v.

BOSTON & SAVANNAH STEAMSHIP COMPANY,
APPELLEE.

THE "CITY OF COLUMBUS."

BRIEF FOR BOSTON & SAVANNAH STEAMSHIP COMPANY.

STATEMENT OF THE CASE.

The steamship "City of Columbus," an iron vessel of about 2,000 tons' burden, owned by the appellee, a Massachusetts steamship corporation, left Boston, Thursday afternoon, January 17, 1884, on her regular voyage to Savannah. Early the next morning, about half-past three o'clock, while on her voyage, and passing through Vineyard Sound, she struck on the Devil's Bridge, off and near Gay Head Light, and sixty-nine of her passengers and twenty-eight of her crew were drowned. It is admitted that the stranding was caused by the negligence of those in charge of the navigation of the steam-

ship, and it is also admitted that it was without the privity or knowledge of the appellee, the sole owner of the vessel.

Soon after the loss, actions at law were commenced against the appellee in the State Courts of Massachusetts to recover damages for the loss of life and personal damages caused by the stranding of the steamship. Thereupon, on February 18, 1884, the appellee filed in the District Court of the United States for the District of Massachusetts, the libel printed in the Record, reciting the loss of the steamship, and the damages done thereby, the actions at law brought against the appellee, the fact that the loss was without its privity or knowledge, and praying that pursuant to the rules of this court, proper steps should be taken to give it, as the ship-owner, the benefit of the limitation of liability provided by the act of Congress of 1851. Upon the filing of the libel, the Court caused due appraisement to be had of the amount or value of the interest of the appellee, as owner, in the steamship and her freight for the voyage (about $4,000), and thereupon made an order for the giving of a stipulation with sureties for the payment thereof into court whenever so ordered. The order was complied with, and thereupon the Court, on February 28, 1884, issued the monition provided by the rules of this court to all persons interested in claims arising out of the loss of the steamship to appear and file their claims by July 1, 1884, which monition was published as required. The Court thereafter issued an order restraining the further prosecution of suits arising out of the loss of the steamship.

Thereafter, Sept. 27, 1884, the appellants filed a libel in Admiralty in the same court, claiming, as administrators and heirs of Elizabeth R. Beach, a passenger drowned by the accident, to recover for the loss of life, alleging that the death was caused by appellee's negligence, for which it was liable both by the maritime law, and the statute of Massachusetts, and claiming that such loss of life was not within the limitation of liability provided for ship-owners under the Act of 1851.

The appellants also filed an answer, petition, and exceptions to the appellee's libel, for limitation of liability, and therein repeated the same claim.

The District Court dismissed the libel of the appellants, holding that loss of life was within the limitation of liability provided by the Act of Congress, and the decree was affirmed by the Circuit Court for the first circuit.

The Court further ruled, that evidence offered by the appellants, tending to show that at the time of the disaster the second mate was in charge of the ship; that he was not a pilot for the waters upon which the ship was then going, and was not licensed as a pilot by the inspectors of steamboats; that no pilot was on duty on said ship at the time of the disaster, and that the disaster was owing to the unfitness, gross negligence, or carelessness of the servants or agents of the company, who were engaged in navigating the ship at the time of the disaster, so that the case was within section 6, of chapter 73, of the Public Statutes of Massachusetts; was immaterial, in view of the appellants' admission that the disaster was without the privity and knowledge of the company.

The appellant also filed a motion in the libel of appellee for the limitation of liability, that the appellee be required to pay all insurance money collected on account of the loss of the steam-

ship into court, as part of "the amount or value of the interest" of the appellee in said steamship. To this motion, the appellee filed the answer printed in the Record, the statements in which were found true by the Circuit Court. It appeared, in substance, that the appellee, upon the purchase of the "City of Columbus" and her sister ship the "Gate City," from the Ocean Steamship Company of Savannah, Georgia, for the sum of $520,000, in 1882, gave in part payment eighteen notes, aggregating $468,000, payable six months apart, for sums varying in amount from $39,767 to $26,140, the first note being payable March 11, 1883, and the last Sept. 11, 1891. These notes were secured by a single mortgage, covering both steamships, executed by the appellee. The amount of the unmatured notes outstanding at the time of the loss of the "City of Columbus," and secured by the mortgage, was about $416,000. The mortgage provided that both these steamships should be insured against loss by fire, and against all marine risk by the appellee or mortgagor for the benefit of the Ocean Steamship Company as mortgagee. Under this requirement of the mortgage, F. W. Nickerson & Co., of Boston, the agents of the appellee, procured such insurance on the "City of Columbus," in insurance companies in the United States to the amount of $80,000, and in foreign companies to the further amount of £34,000. All the policies insured "F. W. Nickerson & Co. on account of whom it may concern, in case of loss to be paid to F. W. Nickerson & Co., or order." Said policies were immediately indorsed by F. W. Nickerson & Co., "Pay to the Ocean Steamship Company, of Savannah, in case of loss, F. W. Nickerson & Co.," and delivered to said Ocean Steamship Company as mortgagee, for whose benefit the insurance was procured under the requirement of the mortgage. After the loss of the "City of Columbus" the Ocean Steamship Company collected said insurance money as payee and mortgagee, and applied the same to the partial payment of the unmatured

mortgage notes. This was the only insurance upon the steamship or pending freight.

The Circuit Court, having found the facts to be as recited in the answer of the appellee, decided, that upon these facts, the appellee was not liable to pay the insurance money into court as prayed by appellants.

The decision of the District Court upon the issues raised is reported in City of Columbus, 22 Fed. Rep., 460.

The decree was affirmed by the Circuit Court without a reported opinion.

Issues Raised by the Record.

The Record raises two questions:—

First. Is a ship-owner, after the loss of life of a passenger on board his ship, caused by the negligence ot those navigating the ship, but without the owner's privity or knowledge, entitled to limitation of liability for such loss, under the Limited Liability Act of 1851?

Second. After the loss of the steamship, involving loss of life and other damage, can the ship-owner, in order to limit his liability, be required to pay into court the insurance contracted for and paid to a mortgagee under the circumstances stated in the appellee's answer to appellants' motion,—as being part of the amount or value of the interest of such owner in such vessel, and her freight then pending?

ARGUMENT FOR THE SHIP-OWNER.

Language of the Act and Context.

When the Congress made provision for the limitation of ship-owners' liability in 1851, having before it the Massachusetts and Maine Statutes, the acts of Parliament, and the Maritime Codes of Continental Europe, it expressed the legislative intention in this broad language:—

"That the liability of the owner or owners of any ship or vessel for any embezzlement, loss, or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship, or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners, respectively, in such ship or vessel, and her freight then pending."

Act of March 3, 1851. 9 Sts. at Large, 635.

The whole act is printed as an appendix in this brief.

In the Revised Statutes some words of this section are omitted, as unnecessary, and in the clause, "or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred," the word *lost*, intentionally or accidentally, is substituted for the noun "*loss*."

U. S. Rev. Sts., § 4283.

We do not see that the change is material; but in any event, if their is any discrepancy, the original act must control, under

Act of March 9, 1878. 20 Sts. at Large, 27.

Moreover, the word "loss" was added to the act of 1851, as an amendment moved by Mr. Hamlin in the Senate, and was therefore intended to give some added force to the Act.

23 Cong. Globe, p. 715.

This Court early recognized that it was the intention of the Congress to give the benefit of limitation of liability to ship-owners, under this section of the act, in *three* classes of cases.

"This section, as constructed, limits the ship-owner's liability in *three* classes of damage; or wrong, happening without their privity, and by the fault or neglect of the master, or other persons on board, viz.: 1st, damage to goods on board; 2d, damage by collision to other vessels and their cargoes; 3d, any other damage or forfeiture done or incurred." (Bradley, J., Norwich Co. *vs.* Wright, 13 Wall. 121.)

Loss of goods or baggage on board comes under the *first* class; and loss of life and personal injuries must come under the *third* class. If the infliction of loss of life is not an "*act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred*," what is it? The utmost violence done to language will fail to render this clause inapplicable to losses of life and damage to the person. The Court cannot restrict the limitation to loss of goods without actually striking words out of the act. This *third* clause, referred to by Mr. Justice Bradley, must be given meaning and application. The Congress intended something by the use of the words. If it refers only to loss of, or damage to, *property, goods*, or *merchandise*, it is unnecessary and meaningless; for such loss, if it happen on the vessel, is covered already by the *first* clause; and if it happens on another vessel, is covered by the *second* clause. The *third* clearly extends the limitation, and the only extension possible was to loss of life and damage to the person. This Court so recognized in Admiralty Rule 54.

That the Congress had in mind such extension of the limita-

tion is also shown by the previous section (§ 4282), exempting the owner from liability for loss by fire to "any merchandise whatsoever" on board. The *exemption* is expressly restricted to loss of merchandise; the *limitation* is as expressly extended to all losses. (Prov. & N. Y. Steamship Co. *vs.* Hill Mfg. Co., 109 U. S., 578.)

And so the following section (§ 4 of Act of 1851) providing for a surrender of the vessel, "whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever," merely provides a method of procedure where the loss is of the *first* class, leaving the Court, by necessary rules, to provide the method of enforcing the limitation in the other *two* classes of losses, within section 3 of the act. It does not, by implication, engraft any restriction upon the previous section. As said by Judge Benedict (Epsilon, 6 Ben., 386), "But no such result necessarily arises from the absence in the fourth section (§ 4284) of any provision respecting claims for injuries to the person. The manifest object of section 4 was to indicate methods to which resort might be had to carry the third section into effect. It specifies some cases, not necessarily all, where relief may be sought under the act; and it specifies some, but by no means all the machinery to be used to give the relief. It contains, however, no language which appears to be intended to convey the idea that no other cases than those specified in the section could arise under the act. Even the meagre provisions which the section does contain seem unnecessary, and, in my opinion, the whole section could be stricken from the act, without in the slightest degree impairing its efficiency."

The Supreme Court of Rhode Island has gone further, and held that — even where the ship-owner seeks the remedy by surrendering his vessel under § 4285, he is yet entitled to limitation of liability for injury to person as well as to property.

Rounds *v.* Prov. & Ston. S.S. Co., 14 R.I., 344.

"The first question is, whether the sections (4284 and 4285) extend to injuries to the person as well as to injuries to property. The language of § 4283 is plainly broad enough to include injuries to the person. It extends to 'any loss, damage, or injury, by collision,' and to 'any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge, of the ship-owners.' The object of the section was to limit the liability of such owners, and the words seem to have been carefully chosen for the very purpose of carrying the limitation to every loss or injury for which there was any liability. There would be no doubt upon this point were it not for the next two sections which make provision for the procedure for giving effect to the limitation. These sections, if we look only to the letter, apply only to injuries and losses of property. The question is, therefore, whether we shall, by construction, bring the three sections into correspondence, confining the scope of § 4283 to injuries and losses of property, or by enlarging the scope of the two other sections so as to include injuries to the person. We think it is more reasonable to suppose that the designation of losses and injuries in §§ 4284 and 4285 is imperfect, a part being mentioned representatively for the whole, and, consequently, that those sections were intended to extend to injuries to the person, as well as to injuries to property, than it is to suppose that § 4283 was intended to extend only to the latter class of injuries, and was inadvertently couched in words of broader meaning. The probable purpose was to put American ship-owners on an equality with foreign ship-owners in this regard, and in the great maritime countries of England and France, the limitation of liability extends to personal as well as to property injuries and losses." (Durfee, C.J.)

And the Supreme Court, by its rules made to enforce the provisions of the act, distinctly recognizes the fact that the

right to limitation extends to other losses than those named in the 4th section. (U. S. Rev. Sts., § 4285).

Admiralty Rules, 54–57.

If section 4 of the act made provision for the only classes of cases in which the ship-owner was entitled to limitation, these rules of the Court were unnecessary, as the act itself provided sufficiently the mode of getting the benefit of the limitation.

If there be any force in the argument that section 4 of the act limits or defines the limitation, then (contrary to the express decision in Norwich Company *v.* Wright, 13 Wall, 104) "loss, damage, or injury by collision" is also excluded from the limitation, and section 4 no more recognizes that loss than it does loss of life. If the appellants' contention, that the limition is confined to loss of goods, is correct, how can the ship-owner limit the liability for loss of life caused on another vessel by collision with his own?

History of the Limited Liability Act.

There is nothing in the circumstances under which the Act of 1851 was enacted to justify the narrow construction claimed by the appellants.

In January, 1840, the steamboat "Lexington," running between Providence and New York with passengers and merchandise, was burnt on Long Island Sound, and the loss resulted in a great loss of life, as well as of property.

The case of New Jersey Steam Navigation Company *v.* Merchants' Bank, 6 How., 744, followed, in which this court, in a claim for loss of specie on board, held that the ship-owner was

liable for the negligence causing the loss, even though he had contracted for exemption from liability.

"That decision led to the enactment of the statute." (Miller, J.)

Walker *v.* Transportation Co., 3 Wall, 150, 152.

The Congress must then have had in mind not only the fact that both passengers and merchandise were carried on steamboats, but that both had recently been subjected to frightful loss, suggesting the necessity of some limitation of ship-owner's liability. And its intention in the enactment of the law is stated by Mr. Justice Nelson, in the first case arising under it.

Moore *v.* American Trans. Co., 24 How., 1.

In reasoning that the provisions of the act should be ex-extended over the great lakes, he says, "*The appalling destruction of life in the loss of the 'Erie,' upon Lake Erie, and of the 'Superior,' and 'Lady Elgin,' upon Michigan, are still fresh in the recollections of the country,*" (p. 39,) — language useless and misleading, unless the learned Justice considered that the act was intended to and did limit the ship-owner's liability for this "appalling destruction of life."

While it is unquestionably true that the Congress in framing the act had before it, and consulted the Massachusetts and Maine act, and the English statutes, it is equally apparent that it did not follow the exact language of any of them, but added language making clearer the extent of the ship-owner's right to limit liability. This Court has construed our act differently from the construction put upon the English acts by the English courts.

The English Courts say the value of the *res* was to be regarded as the value *before* the loss. This Court holds that under the act of Congress, the value is the value *after* the loss.

Norwich Co. *v.* Wright, 13 Wall, 104.

ship and freight. Otherwise, he would run the risk of being ruined by the bad faith or negligence of his captain, and the apprehension of this would be fatal to the interests of navigation. It is quite sufficient that he be exposed to the loss of his ship and of the freight, to make it his interest independently of any goods he may have on board to select a reliable captain." (Valin, cited in 13 Wall, 117.)

All the continental authorities are cited in the learned opinion of Judge Ware, in the "Rebecca," and their opinions are summed up by him as follows: "I think it may be safely affirmed that, by the general maritime law of Europe, the liability of owners *for the wrongful acts of the master* is limited to the interest they have in the ship, and that, by abandoning the ship and freight to the creditor, they discharge themselves from all personal responsibility." (p. 198.)

What the "wrongful act" was, or what its effect was, whether to destroy life or property, was immaterial. The *vessel* alone, and not her *owner*, responded for it.

Judge Benedict, in the "Epsilon," also reviewed these authorities, and concluded (6 Ben., 385) that "The text-writers on maritime law, whose works I have been able to consult, do not appear to allude in terms to the effect of the Ordinance or the Code de Commerce, upon demands arising out of personal injuries, but the language everywhere used is broad enough to cover such demands. 'The abandonment of the ship and freight puts an end to every kind of responsibility on the part of the owner' (Caumont Dict. Mar. Law, p. 24, traité Abandon, § 13). That the rule of the maritime law is there so understood appears from a case before the Court of Cassation, in January, 1860, involving claims by passengers, where it was declared that, 'even where the ship is totally lost, and although the passenger has not made a special commercial contract upon taking passage on a steamboat, no provision of law prevents the application of the rule of limited liability declared in section 216

of the Code; otherwise, the special responsibility resulting in favor of passengers would be more onerous even than that resulting from a shipment of merchandise; such an exception would be, in fact, contrary to the spirit, as to the words of the law.' (Ib., § 83). The law upon this subject in Italy, Portugal, Holland, Denmark, Sweden, and Russia is said to agree with that of France."

And so, the Congress, in enacting the Act of 1851, extended the limitation by express terms beyond the restricted limitation of the English statutes then in force (53 Geo. III., ch. 159), applying the limitation only to loss of property. The English Merchants' Shipping Act of 1854 still enforced the liability of the ship-owner for loss of life. But the Act of 1862 (25 and 26 Vict., ch. 63), by expressly providing a limitation, "where loss of life or personal injury is caused to any person being carried in such ship," made the law of England conform to that of this country and of Europe. But even if the act of the Congress was based on the State statutes of Massachusetts and Maine, these State statutes, like the law of continental Europe, extended the limitation of the owner to "any act, matter, thing, damage, or forfeiture, done, occasioned, or incurred, by such master or mariners without his privity or knowledge."

Mass. Pub. Sts., ch. 69, §§ 1–4.
Maine Rev. Sts., ch. 36, §§ 5–6.

There is no intrinsic or extrinsic evidence that the Congress adopted or intended to incorporate the preambles to the Act of 7 Geo. II., ch. 15, and Mass. Act of 1818 into the Congressional legislation. A contrary intention appears from the language of the act of Congress, which, by extending the limitation to losses by collision, and all other losses, renders these preambles inapplicable.

Reasons for the Limited Liability Act.

It is submitted that the reason for the limitation applies fully as much to loss of life as to loss of property. Its object was to lessen the liability generally of ship-owners, not to limit it to any special class of losses. It was enacted at a time when probably a larger proportion of travellers, than at the present time, were carried by sea rather than by land.

"The act," said Mr. Justice Nelson (Moore vs. Trans. Co., 24 How., p. 39), "was designed to promote the building of ships, and to encourage persons engaged in the business of navigation, and to place that of this country upon a footing with England, and on the continent of Europe. The act not only exempts the owner from casualty of fire, but limits his liability in cases of embezzlement, or loss of goods on board, by the master, officers, etc., and also for loss or damage from collisions, and, indeed, for any loss or damage occurring without the privity of the owner to an amount not exceeding the value of the vessel and freight."

"The great object of the law was to encourage shipbuilding, and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount." (Mr. Justice Bradley, Norwich Co. v. Wright, 13 Wall, 121.)

"That object was to enable merchants to invest money in ships without subjecting them to an indefinite hazard of losing

their whole property by the negligence or misconduct of the master or crew, but only mitigating them to the loss of their investment." (Mr. Justice Bradley, The City of Norwich, 118 U. S., 468, 504.)

And see

Walker v. Boston Ins. Co., 14 Gray, 202.

With this object in mind, the Court has always refused, by construction, to restrict the limitation. In Moore v. Trans. Co. (supra), it held that it applied as well to vessels on the great lakes as to those on the ocean, on the ground that "it would be unreasonable to suppose that Congress intended to apply one rule of responsibility to the owner in respect to the same vessel upon the ocean, and another upon the bays or rivers, in the course of the same voyage. Besides, the absence of any good reason for such a distinction, as to the rule of responsibility, it would have seriously embarrassed all parties engaged in commerce of this description, in respect to their securities against accidents and losses by means of insurance, bills of lading, charter parties, etc." (p. 30). And so in Norwich Co. v. Wright (supra) the Court held the limitation applied as well to goods injured by collision on another vessel, as to goods on the vessel of the owner seeking limitation: "And if there exists good reasons for exempting innocent shipowners from liability, beyond the amount of their interest, for loss or damage to goods carried in their vessels, precisely the same reasons exist for exempting them to the same extent from personal liability in cases of collision. In the one case, as in the other, their property is in the hands of agents whom they are obliged to employ." (13 Wall, 121). In Lord v. Steamship Co. (102 U. S., 541) no distinction as to right to limitation was made between vessels navigating between ports in the same State and other vessels. In the "Scotland" (105 U. S., 24), the limitation was applied to foreign-owned vessels, as

well as to domestic. In Wallace v. Prov. & Ston. Steamship Co. (14 Fed. Rep., 56) the Court refused to make any distinction between *registered* and *enrolled* vessels, or any other of the distinctions claimed in the demurrer. In the case of Prov. & N. Y. Steamship Co. (109 U. S.) the Court decided the limitation extended to loss by fire, without the privity or knowledge of the owner, although the previous section of the act provided for a total exemption, if the fire occurred without his neglect. In the "City of Norwich" (118 U. S., 468) the Court decided that the value of the vessel was the value at the end of the voyage that no unearned freight was to be estimated in fixing the amount of owner's liability; that insurance money formed no part of the owner's "interest" for which he was liable; and that an abandonment to the underwriters did not make a waiver of the owner's right to claim limitation. In the "Scotland" (118 U. S., 507) the Court decided that the Court was not bound to allow interest on the amount of owner's interest. And see

The Great Western, 118 U. S., 520.

Why, then, should there be any more discrimination in the *classes or character of the losses* than in the *place where, or the vessels upon which*, they occur? Equally "it would be unreasonable to suppose that the Congress intended to apply one rule of responsibility to the owner," in one class of losses, on the same vessel, and happening at the same time, and from the same cause, and another rule of responsibility to other losses.

Why should the Congress, having for its object the encouragement of ship-building and ship-owning, limit liability only for loss of property, and refuse to limit the greater liability for loss of life?

The great bulk of the freight-carrying trade of the world is to-day done in passenger carrying steamships. Property and

lives are joined in every maritime hazard. The causes, negligent or accidental, that injure the one, affect equally the other.

If the Congress has made the distinction, the Limited Liability Act, so far as the owners of passenger steamships are concerned, is of little or no benefit.

For instance, take a case like the present (liable to occur at any time to any steamship), of a loss of 100 lives by the stranding and sinking of the vessel. If, as the appellants claim, $50,000 are a reasonable sum to be recovered of the ship-owner for each life lost, the owner has incurred a liability of $5,000,000; to which must be added the damages to each surviving passenger for personal injuries received. The loss of property sinks into utter insignificance, and it is wholly immaterial to any ship-owner, if he is responsible for these greater losses, whether he can limit his liability for loss of property or not. In either case, his defence must be the limitation fixed by bankrupt and insolvent laws, instead of the limitation the Congress has been supposed to have given him.

This was the liability which the Congress intended to limit. It differs from liability of a carrier on land, where the business, as a rule, is done by large railroad and other corporations, and where no one act of negligence can be attended with the same enormous disproportionate loss. But an owner, or part owner, of a steamship may, by a single omission of the master, or other officer or mariner, incur a liability utterly ruinous to him. Would any prudent person engage in owning or running steamships, if subjected to a liability so greatly disproportioned to the profit?

"This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases. The great carrying trade by land is governed by substantially the same principle; — being in the hands of corporate associations, whose members are not personally liable for acts of the employees, but risk only the amount of their capital

stock in the corporation. The doctrine of *respondent superior*, it is true, applies to the corporations themselves; but that does not interfere with the personal immunity of the shareholders. Whenever the public interest requires the employment of a great aggregation of capital exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise. As Grotius says, in reference to this very matter of ship-owners, 'Men would be deterred from owning and operating ships if they were subject to the fear of an indefinite liability for the acts of the master.' Jure B. & P. lib. 2, c. 11, s. 13." (MR. JUSTICE BRADLEY.)

The Scotland, 105 U. S., 24, 31.

THE SECURITY OF LIFE.

If it be argued that the proper security of life demands an exception of loss of life from the limitation of liability, we answer:

1. The argument will be more properly addressed to the Congress, with power to enact law, than to this Court, with only the power of construing it after enactment. The question is not should Congress except loss of life from the act, but has it, in fact, done so?

2. The argument is answered by Judge Benedict, in the "Epsilon" (6 Ben., 382): "I am not unmindful that it may be urged that the rule of liability imposed upon the owners of ships by the maritime law is founded upon public policy, and that when it is to be applied to modern navigation, the limitation of that liability must be restricted to injury to property, because otherwise the tendency of the rule would be to deprive the public of such protection against accidents as a fear of

unlimited liability for injuries to persons on board vessels will naturally compel ship-owners to afford. But this consideration has force only in regard to a certain class of persons, and fails to furnish grounds for a construction which, if it places any, must place all personal injuries beyond the scope of the act. Considerations of a very similar character have furnished the ground for all the opposition which has been made to the rule of limited liability, and they have in most countries been overpowered by the strong public interest to encourage the investment of capital in ships. *It is, of course, highly important to protect the persons of those who are carried in ships, but in order that there may be any persons carried, there must be ships to carry them.* The Act of 1851 does not apply to river or inland navigation, but is confined to a commerce where the amount of property and number of persons transported on each voyage is upon the increase, while the hazard of the navigation does not diminish. In a late collision, off Dungeness, some hundreds of persons were destroyed or injured. The investment of capital in such a commerce might well be deterred by a refusal to give the benefit of the Act of 1851, in respect to demands for injury to the person. The necessary protection of life against neglect may, perhaps, be better secured by criminal punishments inflicted on those guilty of the neglect, than by increasing the risks of capital invested in navigation. There is also a reason for the rule of limited liability, founded in justice to the ship-owner, which is applicable alike to demands arising out of injuries to persons and to property. It is, that the master and crew of a ship are agents, forced upon the ship-owner by the necessities of navigation, to whom he is compelled to intrust his ship, an instrument of great power for good and for ill, but whose actions he cannot, in the nature of things, superintend or control; and for whose acts, either of omission or commission, therefore, he should not be responsible beyond the value of the property which he has been willing to commit to their control."

3. We add that the Congress, by a series of laws and statute requirements, has adopted every possible means of securing the safety of persons at sea, and imposed heavy penalties upon ship-owners for failure to comply with them. (U. S. Rev. Sts., Title LII., chs. 1, 2, §§ 4399–4500.)

These statutory regulations have greatly extended the liability of ship-owners beyond that existing at common law.

Sherlock *v.* Alling, 93 U. S., 99.

And that liability is limited in amount only where the loss is without his privity or knowledge.

4. And such *limitation* is not equivalent to *exemption*. The whole value of the owner's interest in the vessel, as well as pending freight, must be appropriated to pay for all damage inflicted. Either the owner has lost his property in the vessel by the same disaster, or he must surrender it to the other sufferers by the loss. In either event, he has a pecuniary interest in the safe carriage of passengers and goods, at least, to the value of the vessel conveying them, and what is earned by doing so.

Legislation Regulating Passenger-carrying Steamships.

The acts of Congress in regard to the equipment and management of passenger-carrying steamships do not repeal or modify the limitation of liability secured to ship-owners by the Act of 1851.

The Congress began its legislation "for the better security of the lives of passengers on board of vessels propelled in whole or part by steam" as early as 1838. The Act of July

3, 1838 (5 Statutes at Large, 304) required inspection of boilers, etc., the carriage of boats, fire-engines, hose, etc., and provided (section 6) that "it shall be the duty of the owners and masters of steamboats, licensed in pursuance of the provisions of this act, to employ on board of their respective boats a competent number of experienced and skilful engineers, and in case of neglect to do so, the said owners and masters shall be held responsible for all damages to the property of any passenger on board of any boat occasioned by an explosion of the boiler or any derangement of the engine or machinery of any boat."

Section 12 made misconduct, negligence, or inattention to duty on the part of a captain, engineer, pilot, or other employee on a steamboat, manslaughter; and section 13 made the fact of the bursting of a boiler, collapse of a flue, or other injurious escape of steam, "full *prima facie* evidence, sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment."

This act was in force when the Limited Liability Act was passed, and in face of it, the Congress gave the limitation for "any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner."

The year after the passage of the Limited Liability Act, August 30, 1852, this Act of 1838 was amended, in a very elaborate act, and additional precautions required for the safety of passengers. Inspection of hulls and boilers was made more rigid, local inspectors were appointed for that purpose, and to "license and classify all engineers and pilots of steamers carrying passengers." It was made (§ 10) "unlawful for any person to employ, or any person to serve, as engineer or pilot, on any such vessel, who is not licensed by the inspectors." And section 30, is *verbatim* the provision in U. S. Rev. Sts.,

§ 4493: "Whenever damage is sustained by any passenger, or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured, to the full amount of damage, if it happens through any neglect to comply with the provisions of the law herein prescribed, or through known defects or imperfections of the steaming apparatus or of the hull."

10 Sts. at Large, 61.

This legislation, almost contemporaneous with the Limited Liability Act, was merely amendatory to the Act of 1838, and cannot be assumed to be any expression of legislative intention to modify the Act of 1851. Certainly no one claimed any such effect for it for thirty years after the two acts were placed, almost side by side, on the Statute Book. Can it be supposed that the Supreme Court, which has so carefully upheld and fostered the Limited Liability Act, and, by its rules, made it so beneficial to commerce, will say now, that, ever since 1852, it has been to so great an extent, expressly or impliedly, repealed by the passenger steamship legislation of the Congress?

The legislation of 1871, regarding steamships, is based upon, and merely an elaboration of, the Act of 1852, called for by the modern progress in construction and inspection of vessels and machinery.

The sections referred to by the appellants were all, in substance, in the former act, and can have no greater effect upon the Limited Liability Act than had the Statute of 1852.

When the Congress sees fit to repeal or modify the Limited Liability Act, and change a system of law, recognized for centuries in the commercial nations of the world, it is safe to predict that it will not do it by the use of an adjective, or any other mere implication. The word "*full*," in section 30 of the

Acts of 1852 (U. S. Rev. Sts., § 4493), merely takes the place of the word "*all*" in section 6 of the Act of 1838.

The two legislations are perfectly consistent. The steamship passenger regulations impose liabilities upon the ship-owner that might not exist in Admiralty, or by the common law. The Limited Liability Act allows not *exemption*, but merely *limitation* for losses for which, under statutes or at common law, the ship-owner is liable. The former increases the classes of losses for which he is liable, but does not deprive him of his statute right to limitation. Having, by statutory regulations, greatly increased the common law liability of passenger steamship-owners, there is greater reason why the Congress should continue the limitation provided.

The Sonwahnaka, 5 Fed. Rep., 624.

It will be noticed that the Acts of 1852 and 1871 (U. S. Rev. Sts., § 4493) provides for "full damages," "whenever damage is sustained *by any passenger*, or *his baggage*," etc.; and it has been expressly held in the Circuit Court for the first Circuit (Lowell & Nelson, J. J.) that the ship-owner can obtain limitation of liability for such loss of baggage.

Wallace *vs.* Prov. & Ston. S.S. Co., 14 Fed. Rep., 56.

The same decision was rendered by the Commission of Appeals in New York.

Chamberlain *vs.* Western Trans. Co., 44 N. Y., 305.

Neither then can section 4493 bar limitation for damages to persons.

Section 4493, in providing a liability in certain cases, no more deprives the ship-owner of his right to limitation of it, under § 4283, than does section 4282, providing for total exemption of liability for loss by fire happening without his neg-

lect, deprive him of the limitation, where the fire is caused by his *neglect*, but without his privity or knowledge.

Prov. & N. Y. S.S. Co. *vs.* Hill Mfg. Co., 109 U. S., 578.

In this connection we call attention to the recent legislation of the Congress, passed after the decisions of the Supreme Court, broadly construing the right of limitation, and the decisions of the District Courts expressly extending it to personal injuries; "that the individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending."

Chapter 121, of Acts of 1884, § 18, p. 57.

Instead of any intention to restrict the limitation, it is broadly extended over liability in *contract*, as well as in *tort*.

Loss of Life under the Massachusetts Statute.

The appellants allege and rely upon the Massachusetts statute, allowing the next of kin of a deceased passenger, killed by the negligence of a carrier of passengers, to recover for the death a sum not exceeding $5,000.

Mass. Pub. Sts., ch. 73, § 6.

It is submitted that the statute does not and cannot affect the right or extent of the limitation of liability provided by the act of the Congress.

The Massachusetts statute providing for recovery of damages for loss of life in certain cases was enacted in order (to a limited extent) to repeal the common law rule, that actions for loss of life do not survive.

And it was within the power of the Legislature to impose this added liability upon the ship-owner.

Steamboat Co. *v.* Chase, 16 Wall, 522.
Sherlock *v.* Alling, 93 U. S., 99.

And such liability can be enforced in the admiralty, in cases arising under, and conformable to, the State statute. The loss occurs on navigable water, and being made by State statute a tort, it necessarily becomes a *maritime* tort. The Admiralty Jurisdiction extends over it, to the same extent and for the same reason that it enforces a statute lien of a material man upon a vessel in her home port.

The Harrisburg, 119 U. S., 199.

The Massachusetts statute is not *penal*, but merely imposes an additional liability to that existing at common law. Under the general statutes (ch. 160, §§ 34, 35) it was provided that, in certain cases of loss of life on steamboats, the proprietor "shall be punished by fine not exceeding $5,000 . . . . to be recovered by indictment," for the benefit of the next of kin. But this statute, even assuming it to have been *penal* in its effect, was repealed in 1881; and in place of it the carrier was made merely "liable in damages not exceeding $5,000 . . . . to be recovered in an action of tort" (ch. 73, § 6).

As Judge Blodgett says in the "Alpena" (8 Fed. Rep., 286): "Most of the statutes in this country, giving a right of action for death caused by negligence, and notably those of Illinois and Michigan, one of which must control in this case, have been substantially copied from Lord Campbell's Act, as it is called in England, and which was enacted prior to the act of

Congress limiting liability of ship-owners, and proceed upon the principle that the heirs, executors, or administrators of the person whose life is lost by the negligence of another, have a pecuniary interest in such life. In some of the States, the amount recovered goes directly to the widow and next of kin, and in others it goes into the general assets; so that the persons entitled to maintain an action may be said to have a 'property' interest in the person whose life is lost; and it is because of this property or pecuniary interest that a right of action is given. I do not look upon these suits as penal suits, punishing the guilty party for his negligence, but only as a remedy for the recovery of the pecuniary interest which the survivors of the person whose life is so lost have in his life."

But even if the Massachusetts statute was *penal*, it is a conclusive answer to any claim that it bars the ship's owners right to a limitation, expressly given him by the Congress (within its exclusive right to regulate commerce and the admiralty and maritime jurisdiction), that then it is, to that extent, and in that application unconstitutional. The Congress, by the Act of 1851, and the Supreme Court, by its rules having assumed jurisdiction over the limitation of liability, it is unnecessary to cite authorities showing that that jurisdiction is necessarily exclusive, and no State authority can interfere with it, or in any way restrict its full and intended operation.

For the same reason it is immaterial whether the statutory right to recover for loss of life existed at the time the limitation of liability was provided by the Congress or not. If it did then exist, the Congress provided a limitation for it in certain cases; if it did not then exist, it could not be afterwards given, except subject to such limitation.

But there is no conflict between the Limited Liability Act and the Massachusetts statute providing a remedy for loss of life. The Massachusetts statute imposes a liability upon the ship-owner not existing at common law. It is merely another lia-

bility, added to the many the Congress and other legislative bodies are constantly imposing. The liability may be properly imposed, but it is still within the limitation of the Act of 1851. The State can determine what losses a ship-owner shall be liable for, but it cannot determine (after the Congress has made provision for the subject) for what losses he shall be entitled to limitation of liability. Adding to the liabilities of ship-owners does not interfere with the Congress; restricting the limitation of liability repeals or restricts an act of Congress. Suppose the State Legislature provide special liability for loss of certain kinds of goods on shipboard. By virtue of such legislation, is the ship-owner deprived of his right to limit his liability for such a loss? If so, the Limited Liability Act of Congress can at any time be modified or repealed by any State Legislature.

There is no more conflict between the Limited Liability Act of Congress and the Massachusetts statute (ch. 73, § 6), providing a recovery for loss of life, than there is between that statute and the Massachusetts statute limiting liability (ch. 69, § 1), yet both are parts of the law of Massachusetts; and both should and can be given operation and effect, each being consistent with the other.

Authorities.

It is not necessary to rest the claim that loss of life is within the statute limitation entirely upon the language of the act, — or its history and purpose. Our contention has now for its support a weight of authority, wholly uncontradicted, which the Court will hesitate to overrule. The precise question has been decided in favor of the ship-owner by the Supreme Court of Rhode Island, also in this case by the first Circuit Court (Gray & Colt, J.J.), — and by five of the most learned U. S. District Judges.

Rounds *v.* Prov. and Ston. S. S. Co., 14 R. I., 344.
Judge Benedict in the Epsilon, 6 Ben., 378.

Judge Choate in the Seawahnaka, 5 Fed. Rep., 599.
Judge Blodgett in the Alpena, 8 Fed. Rep., 280.
Judge Brown in the Amsterdam, 23 Fed. Rep., 112.
And Judge Nelson in the "City of Columbus," 22 Fed. Rep., 460.

It was not deemed necessary to decide the question in

Wallace *vs.* Prov. & Ston. S. S. Co., 14 Fed. Rep., 56.

in which case Judge Lowell sat with Judge Nelson.

In the Rhode Island case actions at law were commenced for damages received by plaintiffs from the collision between the "Narragansett" and "Stonington" in Long Island Sound, in 1880. The defendants pleaded the surrender of their boat and freight to a trustee in New York District Court, under the Limited Liability Act, and plaintiffs demurred to the answer. The Court overruled the demurrer on the ground "that the limitation of liability extends to personal injuries," and the proceeding in the District Court "is a bar to the plaintiff's action in this court."

Judge Benedict says, in the "Epsilon": —

"There is, however, in this case, another question of much importance, and that is, whether the Act of 1851 has any effect to limit the liability of the ship-owner for personal injuries which have been caused without privity or knowledge of the owner, in the course of and by reason of the use of his vessel in her natural and lawful employment. The question is by no means free from difficulty, but the opinion I have arrived at is, that the Act of 1851 limits the liability of the ship-owner, as well for injury done to the person as for those done to property. This conclusion appears to be compelled by the language of the third section of the act. In that section, the words used are, first, 'for property, goods, or merchandise';

next, 'for any loss, damage, or injury'; and then, 'for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred.' These words include all kinds of injuries, for which the ship-owner may become liable in the use of his vessel, and cover injuries to the person, as fully as they do injury to property. The implication of that section is, that the preceding sections cover not only damages arising from injury to property, but in addition thereto 'demands on account of any negligence of the master or crew.' The Supreme Court have been unable to consider the effect of the third section, to be limited to the goods on board the owner's ship, and it is to my mind still more difficult to find anything in the section which can be said to restrict its effect to demands arising out of injury to property alone. If, as has been suggested by the Supreme Court, the intention of the Act of 1851 was, by statute, to establish in this country the rule of the general maritime law in respect to the liability of the owners of ships, it must follow that the act be held to cover demands for injuries to persons, as well as to property." (6 Ben., 382.)

Judge Choate says, in the "Seawahnaka": —

"It is insisted, however, on the part of parties who have commenced suits for personal damage, and also by those who have commenced suits as administrators under the State statutes, that their claims are not liable to be cut off by a decree in this case, and that the restraining order as to them should be set aside. The question, whether a claim for personal injuries is within the statute, was carefully examined in the case of the "Epsilon," *ut supra*, and I see no reason to dissent from the conclusion of Judge Benedict in that case. I do not understand that it is held in that case, as argued in this, that such parties cannot share in the fund. On the contrary, so far as that point is touched upon, the opinion of the Court was to the effect that they could share in it. On the authority of that case, and on what is hereinbefore said as to the nature

of these claims, and the claims for damages by administrators or relatives of persons killed, I am of opinion that they cannot be distinguished from claims arising out of loss of cargo." (5 Fed. Rep., 624.)

Judge Blodgett says, in the "Alpena": —

"All the claims presented so far, excepting that of Hutt, for collision, are by administrators of persons whose lives were lost by the wreck of the steamer, and they make the further question that the Act of Congress does not protect the vessel-owner from liability for loss of life. I do not consider that the character of these claims cuts any figure in determining the question of the jurisdiction of this Court over this petition, because, if liabilities of this character are not covered by the act of Congress, then no order of the Court in this matter can affect them. I, however, had this question before me in the case of the "Sea Bird," a few years since, and came to the conclusion that this class of claims was within the act, and no light which has been thrown on the subject by later decisions, and the discussions of this case, has changed my view in that regard." (8 Fed. Rep., 280.)

Judge Brown says, in the "Amsterdam": —

"The other question, as to whether personal injuries are within the provisions of the statute limiting liability, was carefully considered by Benedict, J., in the case of the "Epsilon," and afterwards by Choate, J., in this court, in the case of the "Seawahnaka"; and in both cases it was held, upon full consideration, that such actions are within the provisions of the act. The reasons for the conclusions there given commend themselves to my judgment, and this application must therefore be denied." (23 Fed. Rep., 112.)

The fact that no other cases have arisen to test the question, notwithstanding the great loss of life on steamboats since 1851, and the fact that apparently these decisions were not appealed from, are strong indications of the general opinion of the bar,

as well as of ship-owners and passengers by sea, that the act of limited liability means what it says, and includes all losses of whatever nature.

And, at the present time, when the Congress, by enacting law, and the Supreme Court, by construing it most favorably to ship-owners, are endeavoring to build up our merchant marine, and restore our flag to the ocean, the Court may well hesitate before placing a construction upon the Limited Liability Act which will render it worthless to all owners of passenger steamships.

The Evidence offered by Appellants was Immaterial, and Rightly Rejected.

The appellants offered to prove: *first*, that at the time of the loss the second mate was in charge of the ship, and was not a pilot for the waters upon which the vessel was then going, and was not licensed as a pilot by the inspectors of steamboats; that no pilot was on duty on said ship at the time of the disaster; and *second*, that the disaster was owing to the unfitness and gross negligence of the servants and agents of the appellee, within the meaning of the Massachusetts statutes providing a liability on carriers of passengers for loss of life. (Mass. Pub. Sts., ch. 73, § 6.)

Agreed Facts, Record, p. 19.

As, however, it was also agreed that the loss was without the privity or knowledge of the appellee, the evidence of the *first* class was admissible only on the contention that the Passenger Steamship Legislation of Congress (U. S. Rev. Sts., §§ 4401,

4493) repealed or modified the Limited Liability Act. But, as hereinbefore contended, this legislation merely *imposes* a liability upon steamship-owners, and does not attempt to repeal or affect the general legislation relating to the limitation of liability. The two legislations are distinct, consistent, and operative.

So long, then, as the loss was without the owner's privity or knowledge, evidence regarding its cause was immaterial.

Second. And for the same reason it is equally unimportant to inquire whether the loss gave a right of action to the appellants under the Massachusetts statute. The question is not one of *liability*, but of *limitation* of liability. The effect of the Massachusetts statute upon, and its relation to, the Limited Liability Act of Congress has been hereinbefore considered.

II.

The Surrender of the Insurance Money as part of the Owner's Interest in the res.

It is further submitted that the decree of the Circuit Court, overruling the appellants' claim that the insurance money be paid into Court, as part of the " amount or value of the interest of such owner in such ship " was correct.

Decree, Record, pp. 26, 27.

The company's answer to the appellants' motion, found to be a true statement of the facts, shows that the company, a Massachussetts corporation, organized with a capital of $150,000, purchased the steamship "City of Columbus," with her sister boat, "Gate City," in 1882, from the Ocean Steamship Company, of Savannah, Ga., paying for both boats $520,000. In part payment for the boats the company gave eighteen notes for the total amount of $468,000 and interest, these notes varying in amount from $39,767, down to $26,140, payable at

periods six months apart, the first note becoming due March 11, 1883, and the last Sept. 11, 1891. To secure these notes, a mortgage was executed to the Ocean Steamship Company, Sept. 12, 1882, on both these steamships, for the sum of $468,000, and duly recorded. All notes which matured were paid. This mortgage, among other things, provided that the Boston and Savannah Steamship Company will immediately insure said steamships against fire and marine risk, in companies to be approved by the mortgagee, for an amount equal to unpaid balance upon said notes; that it will keep said insurance valid at all times, and will immediately assign and deliver to the mortgagee the policies of insurance, and any renewals, having first obtained the proper consent of the underwriters, as collateral security for the payment of said indebtedness, and the mortgage then provides that for any failure to take out and keep alive such insurance, the Ocean Steamship Company can do so, and add the expense, with interest, to the mortgage debt.

Under this provision, the agents of the Boston and Savannah Steamship Company, F. W. Nickerson & Co., procured insurance, under time policies, renewed as they expired, from various underwriters, the total amount of insurance so pending on the "City of Columbus," at the time of her loss, being $80,000 in home companies, and £34,000 with foreign underwriters. All the policies insured F. W. Nickerson & Co., for account of whom it may concern, in case of loss to be paid to F. W. Nickerson & Co., or order, and said policies were immediately indorsed by them to the Ocean Steamship Company, the insurance being procured for its benefit as mortgagee, pursuant to he terms of said mortgage. After the loss, the Ocean Steamship Company, as such mortgagee, and holder and payee of the policies, collected the insurance, about $245,000, and has appropriated the same, as far as it went, to the payment of said

unmatured mortgage notes. This was the only insurance on the steamship at the time of loss.

Appellee's Answer, Record pp. 21–23.

I.

But, even if the insurance had been for the owner's exclusive interest, and been paid to it, such insurance is not "interest in the vessel and pending freight," within the meaning of the Act.

This precise question has been so recently adjudicated in this court, after very able argument and careful consideration, and reported in the elaborate and learned opinion of the Court, with a full statement of the objections of the dissenting Justices, — that it seems out of place now to renew the contention.

The City of Norwich, 118 U. S., 468.
Scotland, Id., 507.
Great Western, Id., 520.

The decision has been accepted and acted upon by ship-owners, shippers, steamship passengers, and underwriters; and under the doctrine of *Stare decisis*, will not lightly be overruled, and a new rule of limitation substituted.

The Lottawanna, 21 Wall, 558.

Nor is there any injustice in giving the act of Congress the meaning and effect required by its terms, and by these authorities.

The ship-owner procures insurance for his personal indemnity and benefit, without any obligation to incur the great expense of such insurance for the benefit of others, even if they are, or may become, his creditors. He gains nothing by the loss of his vessel; the underwriter pays him only its value, — or, as in this case, less than its value, — and takes the risk of doing so, only in consideration of the large marine premiums paid by the

owner. It is as unjust in equity as it is absurd in law to say that if the owner, to avoid paying these premiums, assumes the risk and insures himself in case of total loss, he is exempted from liability, and has saved his premiums; but if, as a prudent man, he effects this expensive insurance, he is exempted from loss only by turning over the benefit of his personal contract to the other sufferers by the same disaster. Such a rule deprives a ship-owner absolutely of the benefits, either of the law of limited liability, or the law of marine insurance. Its inevitable result will be to stop insurance upon vessel property; for, if insured, and the property is not lost, the premium is paid for nothing; if lost, the insurance goes to shippers and passengers. Instead of increasing the safety of passengers at sea, it will be lessened by the absence of one great motive to furnish seaworthy vessels, ability to get insurance, and desire to reduce the premium.

If such liability to pay his insurance money into Court to get the benefit of the limitation should be imposed, the question would at once arise, in these days when the tendency is increasing to insure against every hazard: Can the ship-owner insure his liability of having to pay insurance money into Court? Is it double insurance? If not, must this second insurance also be paid into Court in addition to the original insurance on the vessel? The question of protection to the ship-owner would resolve itself into a question of premium. The ship-owner, to secure indemnity for the loss of his vessel, must insure and pay premiums, not only against the loss of the vessel, but against having to pay this insurance to the other interests on board. In effect, he must insure not only the vessel, but (to the value of the vessel) the passengers and goods.

Again, the insurance is received only in performance of a personal contract between underwriter and ship-owner, and any of these sufferers could have procured, by similar insurance, at like expense, the same indemnity. The cargo was insured. It

is quite probable that of the many persons drowned or injured, some, at least, had life or accident insurance; certainly, all could have had it. If so, their representatives have received, to that extent, indemnity of the same nature as that paid to the ship-owner; if not insured, by what right can they claim the similar indemnity, contracted for by, and paid to, the owner? Can the underwriters on the cargo, or insurers against accident, taking by subrogation the rights of the insured, against the vessel and owners, appropriate to repay the losses paid by them the insurance paid the ship-owner on the vessel?

Suppose there are several owners in a vessel, some insured, others not. Are the insured owners, upon a surrender of the vessel, in order to secure a limitation of liability, to pay in the insurance on their interest? If so, in a case of total loss, the insured part-owners, by the mere fact of the insurance, become alone liable for the losses, while their uninsured co-owners are not only wholly relieved from liability, but have saved the insurance premiums.

Again, take the case where, as in most marine policies, the insurance covers, by the collision clause, damage done by the insured vessel to another vessel. In case of such damage, the underwriter pays only *what the insured has been obliged to pay*. But, suppose the insured vessel is totally lost by the collision, can the owners of the other injured vessel be required to pay the insurance money into Court, and thus make such payment the ground of further liability on the part of the underwriter? If so, the rights of the underwriters are seriously affected. If the vessel in fault is totally lost, then the limitation of liability applies, and her owners, not having to pay collision damages, have no claim under the running down clause in their policy. But if they have to pay the insurance money collected for loss of their vessel into Court, to meet the collision loss, then they have paid a loss for which they are entitled to indemnity from the underwriter under the collision clause. The underwriter,

having in mind in fixing the premium, the right of limitation for damage by collision, finds his liability extended by the Court far beyond its intention or consideration.

II.

But even if, contrary to the recent decisions of this Court, it be held that insurance money, contracted for by the ship-owner for his own benefit, is part of the amount or value of his interest in the vessel, certainly insurance contracted for, as in this case, entirely for a mortgagee, and assigned to and collected by such mortgagee, adds nothing to the owner's interest in the vessel.

We submit, therefore, that there is no obligation upon the ship-owner in this case to pay insurance money into Court which was contracted for, and collected wholly for the benefit and security of the mortgagee; and the mortgagee cannot be required to pay or appropriate it to any other purpose than that provided in the mortgage, — especially as such mortgagee has not even been made a party to the record.

It is a familiar principle of the law of insurance that, "when a mortgage provides that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and in fulfilment of this covenant he takes out a policy of insurance in his own name, which is not assigned to the mortgagee, or made payable to him in any way, the mortgagee is regarded as having an equitable lien upon the proceeds of the policy."

Jones Mortgages, § 400.
Hazard *v.* Draper, 7 All., 267.
Carter *v.* Rockett, 8 Paige, 437.

Cromwell *v.* Brooklyn Ins. Co., 44 N. Y., 42.
Nichols *v.* Baxter, 5 R. I., 491.
Vernon *v.* Smith, 5 Barn., 8 Ald., 1.

Such insurance, therefore, is not subject to attachment by creditors of the mortgagor.

Prov. County Bank *v.* Benson, 24 Pick., 204.

And "a covenant in a mortgage to keep the mortgaged premises insured for the benefit of the mortgagee creates a specific equitable lien upon the insurance money, which is valid as against an assignee in bankruptcy of the mortgagor."

In re Ale Brewing Co., 3 Biss., 175.

À fortiori, does such insurance belong to the mortgagee, when the policies are taken out for him, and immediately assigned to him, and this insurance money collected and appropriated by him.

Under these policies, he could recover the insurance in his own name.

City Five Cents Savings Bank *v.* Penn. Ins. Co., 122 Mass., 165.
Williams *v.* Ocean Ins. Co., 2 Met., 303.
Rider *v.* Ocean Ins. Co., 20 Pick., 259.

And being for his own benefit, the insurance money cannot be claimed, assigned, or interfered with by the mortgagor, and *à fortiori*, not by any creditor of the mortgagor.

May Insurance, §§ 6, 116.
White *v.* Brown, 2 Cush., 412.
Carpenter *v.* Prov. Wash. Ins. Co., 1 6Pet., 495.
Bank of So. Carolina *v.* Ins. Co., 1 Cliff., 85.
Hidden *v.* Slater Ins. Co., 2 Ib., 266.

The mortgagor has not power even to bind the mortgagee to the adjustment with the underwriters.

Harrington *v.* Fitchburg Ins. Co., 124 Mass., 126.

If the mortgagee effects insurance on his own interest, as such, such interest adds nothing to the value of the mortgagor's interest in the insured property, and cannot be appropriated to pay claims against the mortgagor.

King *v.* State Mut. Ins. Co., 7 Cush., 1.

Where Chief Justice Shaw says (p. 4):

"We are inclined to the opinion, both upon principle and authority, that when a mortgagee causes insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs before his debt is paid, he has a right to receive the total loss for his own benefit; that he is not bound to account to the mortgagor for any part of the money so recovered, as a part of the mortgage debt; it is not a payment in whole or in part; but he has still a right to recover his whole debt of the mortgagor. And so, on the other hand, when the debt is thus paid by the debtor, the money is not, in law or equity, the money of the insurer, who has thus paid the loss, or money paid to his use."

And see

Suffolk Ins. Co. *v.* Boyden, 9 All., 123.

And where the premium is paid by the mortgagor, but the policy is taken out for the benefit of, or is assigned to, the mortgagee, the mortgagee still is exclusively entitled to the insurance money, but must apply it to the reduction of the mortgage debt. But such reduction or payment adds nothing to the value of the mortgagor's interest. He has lost the insured property, and with the indemnity fund has paid the debt, for the payment of which the mortgagee would have looked to the property,

had it not been destroyed. The insurance is substituted for the property, after loss, only for the mortgagee's benefit. Suppose the ship-owner, after these policies were issued and indorsed, had made a formal assignment to third parties, creditors, or others, would it have conveyed any claim to, or interest in, the insurance money? Can the law vest a greater interest in such third party than the ship-owner could by contract?

But even if the mortgagor has been benefited by the payment of a debt, how can it be claimed that any specific property of his, or his interest therein, is increased or changed in value?

The claim of these sufferers by the loss of the steamship is confined to the *res*, or its value; how can the fact that the *res* was mortgaged, and then insured for the benefit of the mortgagee, and the debt reduced by the insurance increase the value of such *res?*

And so in

Spring *v.* Haskell, 14 Gray, 309,

the Court, under the Limited Liability Act, held that, "in the assessment of damages to be recovered by the plaintiffs, no deduction is to be made from the value of the ship on account of the subsisting incumbrance upon it, created by the mortgage executed by them. Their interest in it is just the same whether the mortgage is enforced or discharged on payment by them of the debt for which it stands as security. In either contingency, the ship is availed of by them to their own use, and they enjoy the full benefits of their ownership of it." (Merrick, J., p. 317.)

And see,

Farnsworth *v.* Boston, 126 Mass., 1.
Read *v.* Cambridge, Ib., 427.

The owner does not diminish the value of his interest by mortgaging it; *à fortiori*, he does not increase it by insuring it for the mortgagee's benefit.

The mortgagee looks to the insurance expressly secured to

him by contract, as his security for the debt; the creditors look to the *res*, regardless of mortgage or insurance, as their security provided for them by the Limited Liability Act. Neither law or equity can take from an innocent creditor security contracted for by him, and appropriate it to the payment of other and later incurred indebtedness. Even if insurance for the benefit of the ship-owner is incidental to, and part of his interest in the vessel, it certainly cannot be so, when it is for the benefit of the mortgagee. Otherwise, the innocent mortgagee, at least to the extent of his insurance, is made liable for the debts of the mortgaged vessel, out of his control, and that is against every principle and authority in maritime or common law.

Such a rule would make the Limited Liability Act not limit, but transfer, the liability, from the mortgagor, the owner, to the innocent mortgagee.

The question is not one of priority of liens upon the vessel between mortgagee and passengers; but merely a question in statute construction, whether insurance for a mortgagee, secured to him, is any part of the owner's "interest."

It is certainly immaterial, in fixing the amount or value of the interest of the owner in the vessel, to consider the class of losses for which limitation is sought. If loss of life is outside the limitation, the claimant for it has no interest in the *res* in Court, whatever the *res* may be. If loss of life is within the limitation, then the claimant stands precisely the same as claimants for loss of property. Both seek a money compensation. It is the only compensation a Court can give them; and both are proceeding against the same *res*. It is absurd to claim that

the owner's "interest" is of one character and value, for one class of losses, and of a different character and value for other losses.

It is submitted that both the decrees appealed from should be affirmed with costs.

CHAS. THEO. RUSSELL, JR.,
Counsel for Appellees.

APPENDIX.

LIMITED LIABILITY ACT OF 1851.

CHAP. XLIII. AN ACT TO LIMIT THE LIABILITY OF SHIP-OWNERS, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners;

Provided, that nothing in this act contained shall prevent the parties from making such contract as they please extending or limiting the liability of ship-owners.

SECT. 2. *And be it further enacted*, That if any shipper or shippers of platina, gold, gold-dust, silver, bullion, or other precious metals, coins, jewellery, bills of any bank or public body, diamonds or other precious stones, shall lade the same on board of any ship or vessel, without, at the time of such lading, giving to the master, agent, owner or owners of the ship or vessel receiving the same, a note in writing of the true character and value thereof, and have the same entered on the bill of lading therefor, the master and owner or owners of the said vessel shall not be liable, as carriers thereof, in any form or manner. Nor shall any such master or owners be liable for any such valuable goods beyond the value and according to the character thereof so notified and entered.

SECT. 3. *And be it further enacted*, That the liability of the owner or owners of any ship or vessel, for any embezzlement, loss, or de-

struction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending.

SECT. 4. *And be it further enacted*, That if any such embezzlement, loss, or destruction, shall be suffered by several freighters or owners of goods, wares, or merchandise, or any property whatever, on the same voyage, and the whole value of the ship or vessel and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel, in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer, all claims and proceedings against the owner or owners shall cease.

SECT. 5. *And be it further enacted*, That the charterer or charterers of any ship or vessel, in case he or they shall man, victual, and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel, within the meaning of this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof.

SECT. 6. *And be it further enacted*, That nothing in the preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or mar-

iners, for or on account of any embezzlement, injury, loss, or destruction of goods, wares, merchandise, or other property, put on board any ship or vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or mariners, respectively, nor shall anything herein contained lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner of the ship or vessel.

SECT. 7. *And be it further enacted*, That any person shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note, in writing, expressing the nature and character of such merchandise, to the master, mate, officer, or person in charge of the lading of the ship or vessel, shall forfeit to the United States one thousand dollars.

This act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation.—*Approved March 3, 1851.*